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In the Supreme Court of the United States.

OCTOBER TERM, [illegible]

NO. 214.

FILED
APR 6 1903
JAMES H. MCKENNEY,
Clerk.

THE INTERSTATE COMMERCE COMMISSION,
Appellant,

vs.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
THE WESTERN RAILWAY OF ALABAMA, AND
THE ATLANTA AND WEST POINT
RAILROAD COMPANY,
Appellees.

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

Argument of E.D. BAXTER,
of Counsel for Appellees.

April 3, 1903.

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THE ATLANTA AND WEST POINT
RAILROAD COMPANY,
APPELLEES.

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

Argument of ED. BAXTER,
of Counsel for Appellees.

STATEMENT OF THE CASE.

I.

THE DECREE APPEALED FROM.

The appellant, the Interstate Commerce Commission, appeals from a decree rendered by the United States Circuit Court of Appeals for the Fifth Circuit, reversing a decree rendered by the

Circuit Court of the United States for the Southern District of Alabama, at Mobile, Ala., on the 2d day of December, 1899 (Trans., pp. 399, 400), which enjoined the appellees to obey a certain order made by the Interstate Commerce Commission on the 31st day of December, 1897; which order directed the appellees to desist from charging "any greater compensation in the aggregate for the transporting of freight articles from New Orleans, La., for the shorter distance to La Grange, Ga., than they contemporaneously charge" . . . "for transporting the like kind of freight traffic from New Orleans for the longer distance, over the same line, in the same direction, to Hogansville, or Newnan, or Palmetto, or Fairburn, Ga., the shorter being included within the longer distance."

And said last mentioned order also "recommended" that the appellees "so revise their schedules of rates and charges that the aggregate compensation charged and collected by them from New Orleans to La Grange (on) freight articles embraced in the several classes shall not exceed" certain specified rates which are not higher than the rates which the appellees charge from New Orleans, La., to Atlanta, Ga.

Trans., pp. 48 to 51.

II.

Proceedings Before the Commission. The Petition.

Fuller E. Calloway filed a petition before the Interstate Commerce Commission against the appellees.

Said petition averred, among other things, that the appellees had heretofore established, and do now charge, demand, collect, and receive from complainant, and other shippers, or consignees, certain rates per hundred pounds for the through transportation

of various classes or kinds of freight articles, from New Orleans, in the State of Louisiana, to La Grange, Hogansville, Newnan, Palmetto, and Fairburn, in the State of Georgia.

That said rates per hundred pounds from New Orleans to La Grange yield the appellees rates per ton for each mile of haul ranging from over 1⅓ cents on the lowest rate, to nearly 6¾ cents on the highest or Class A rate, and are excessive, unreasonable, and unjust charges for the service rendered both in themselves, and relatively, as compared with rates charged by the appellees from New Orleans to Hogansville, Newnan, Palmetto, and Fairburn, and with rates in force over the appellees' roads from New Orleans to other localities.

That said rates from New Orleans to La Grange, and other points, unjustly discriminate against the complainant and others, the city of La Grange and vicinity, and traffic thereto, and subject merchants and dealers therein to undue and unreasonable prejudice and disadvantage in favor of merchants and dealers at Hogansville, Newnan, Palmetto, Fairburn, and other localities, and traffic consigned thereto.

That said rates are in violation of Sections 1, 2 and 3 of the Act to Regulate Commerce.

That said rates from New Orleans to La Grange, Hogansville, Newnan, Palmetto, and Fairburn give the appellees greater compensation in the aggregate for the transportation of like kind of property, under substantially similar circumstances and conditions, for the shorter distance from New Orleans to La Grange, than for the longer distance over the same line in the same direction from New Orleans to Hogansville, Newnan, Palmetto, or Fairburn, and are in violation of Section 4 of the Act to Regulate Commerce.

Said petition prayed, among other things, that an order be made commanding the appellees to cease and desist from the aforesaid violations of the Act to Regulate Commerce, and to establish and charge transportation rates from New Orleans to La Grange not in excess of charges which may be found reasonable, just, and lawful; and for such other and further order or orders as the Commission might deem necessary or just in the premises.

Trans., pp. 5, 7.

III.

The Answer to the Petition Filed Before the Commission.

The appellees filed a joint and several answer before the Commission.

They admit that they have heretofore established, and do now charge, demand, collect, and receive from shippers or consignees, certain rates per 100 pounds for the through transportation of various classes or kinds of freight articles, from New Orleans, in the State of Louisiana, to La Grange, Hogansville, Newnan, Palmetto, and Fairburn, in the State of Georgia.

They admit that said rates are correctly set forth in the complaint, with certain exceptions which need not now be enumerated.

They admit that said rates per 100 pounds from New Orleans to La Grange yield them rates per ton, for each mile of haul, ranging from 1.36 cents on the lowest class (D), to 6.71 cents on the highest class (1); but they deny that any of said rates are excessive, unreasonable, or unjust charges for the service ren-

dered, either in themselves, or as compared with rates charged by appellees from New Orleans to Hogansville, Newnan, Palmetto, or Fairburn, or as compared with rates in force over appellees' roads from New Orleans to other localities—where the transportation to such other localities is conducted under circumstances and conditions substantially similar to those under which the transportation from New Orleans to La Grange is conducted.

They deny that any of said rates charged by them from New Orleans to La Grange, as compared with rates charged by them from New Orleans to other points, are unjustly discriminative against complainant, or any other person, or against the city of La Grange or its vicinity, or the traffic thereof.

They deny that any of said rates subject merchants or dealers at La Grange to any undue or unreasonable prejudice or disadvantage, or that they give any undue or unreasonable preference or advantage to merchants or dealers at Hogansville, Newnan, Palmetto, Fairburn, or other localities, or to traffic consigned thereto.

They deny that any of said rates violate Sections 1, 2 or 3 of the Act to Regulate Commerce.

They admit that the rates charged and collected by them from New Orleans to La Grange yield a greater compensation in the aggregate for the transportation of like kinds of property, for the shorter distance from New Orleans to La Grange, than for the longer distance over appellees' roads in the same direction from New Orleans to Hogansville, Newnan, Palmetto, or Fairburn; but they deny that the transportation of property from New Orleans to La Grange is conducted under substantially similar circumstances and conditions with the transportation of property from New Orleans to either Hogansville, Newnan, Pal-

metto, or Fairburn; and therefore they deny that said rates are in violation of Section 4 of the Act to Regulate Commerce.

They aver that the Louisville & Nashville Railroad Company operates a railroad from New Orleans, La., to Montgomery, Ala.; the Western Railway of Alabama operates a railroad from Montgomery, Ala., to West Point, Ga.; and the Atlanta & West Point Railroad Company operates a railroad from West Point to Atlanta, Ga.

They aver that La Grange, Hogansville, Newnan, Palmetto, and Fairburn are all local stations, situated on the Atlanta & West Point Railroad, between Montgomery, Ala., and Atlanta, Ga.

Beginning at Montgomery on the west, and going eastwardly, the distance from Montgomery to La Grange is 104 miles; from Montgomery to Hogansville, 117 miles; from Montgomery to Newnan, 136 miles; from Montgomery to Palmetto, 150 miles; and from Montgomery to Fairburn, 157 miles.

They aver that freight shipped from New Orleans, over their above described roads, destined to La Grange, would, if distance alone could control, be charged lower rates than freight shipped from New Orleans to any other one of said local stations. In fact, the rates from New Orleans to said local stations, respectively, would, if distance alone could control, increase as their respective distances from New Orleans increase.

If it were possible in that section of the country to adjust freight rates on the basis of distance alone, the rates from New Orleans to said local stations would be made by adding the rates from New Orleans to Montgomery to the rates from Montgomery to said local stations, respectively.

The following table, (A), shows what said rates would be if it were possible for appellees to use distance, as a controlling factor, in making said rates:

TABLE A.

Rates from New Orleans, La., to certain local stations on the Atlanta & West Point Railroad, arrived at by adding rates from New Orleans, La., to Montgomery, Ala., to rates from Montgomery to said local stations.

	CLASS. RATES PER 100 POUNDS.												Per Barrel.
	1	2	3	4	5	6	A	B	C	D	E	H	F
New Orleans to Montgomery...	94	88	74	59	48	37	24	27	20	16	44	29	32
Montgomery to LaGrange.....	75	65	59	45	38	31	31	33	27	22.5	41	45	52.5
New Orleans to LaGrange.....	169	153	133	104	86	68	55	60	47	38.5	85	74	84.5
New Orleans to Montgomery...	94	88	74		48	37	24	27	20	16	44	29	32
Montgomery to Hogansville....	81	70	63		41	33	33	35	28.5	23.5	44	51	55
New Orleans to Hogansville..	175	158	137	110	89	70	57	62	48.5	39.5	88	80	87
New Orleans to Montgomery...	94	88	74	59	48	37	24	27	20	16	44	29	32
Montgomery to Newnan.....	88	77	70	56	46	35	35	37	25.5	24	49	56	51
New Orleans to Newnan	182	165	144	115	94	72	59	64	45.5	40	93	85	83
New Orleans to Montgomery..	94	88	74	59	48	37	24	27	20	16	44	29	32
Montgomery to Palmetto.....	91	80	72	58	47	36	36	38	30	25.5	46	58	58
New Orleans to Palmetto	185	168	146	117	95	73	60	65	50	41.5	90	87	90
New Orleans to Montgomery...	94	88	74	59	48	37	24	27	20	16	44	29	32
Montgomery to Fairburn.....	95	83	74	60	48	38	33	40	30.5	26	45	60	59
New Orleans to Fairburn	189	171	148	119	96	75	60	67	50.5	42	89	89	91

They aver that the rates which they would realize, were it possible to base said rates upon distance alone, would, as shown in said table, be very materially higher than the rates now actually charged by them; and that it would therefore be manifestly to their advantage to base said rates on distance alone, if it were possible for them to do so.

They aver, however, that it is not possible to base said rates on distance alone; and they state the following as reasons why

they are compelled to accept rates which are very much lower than might be reasonably charged if they could utilize distance as a controlling factor.

First: Atlanta, Ga., is the pivotal point for the purpose of rate making, into, and out of the territory south of the Ohio River, and east of the Mississippi River.

Second: The rates on every class of freight from Baltimore, and other Northeastern supply markets, to Atlanta, are controlled by the low rates accepted by steamships and sailing vessels from Baltimore to Savannah, and by steamboats on the Savannah River from Savannah to Augusta; added to rail rates established by the Georgia Railroad Commission from Augusta to Atlanta.

Baltimore, and other Northeastern supply markets, compete with each other for the trade of Atlanta; and numerous carriers, whose lines extend from Baltimore, and other Northeastern supply markets, to Atlanta, compete with each other for the carriage of traffic passing between said points. Some of said carriers are part rail and part water, and some of them are all rail.

The competition between Baltimore, and other Northeastern supply markets, as well as the competition between the numerous carriers whose lines extend from said markets to Atlanta, is active, aggressive and effective.

Third: Cincinnati, Ohio, and Louisville, Ky., are important supply markets, situated on the Ohio River; and they have lines of railway which extend to Atlanta.

Every class of freight that is shipped from New Orleans to Atlanta, is also shipped to Atlanta from Cincinnati, Louisville, and other Ohio River points, as well as from Baltimore, and other Northeastern supply markets.

Cincinnati, Louisville, and other Ohio River supply markets, not only compete with each other, but they also compete with Baltimore, and other Northeastern supply markets for the trade of Atlanta. And the various rail carriers whose lines extend from Cincinnati, Louisville, and other Ohio River supply markets, to Atlanta, not only compete with each other for the carriage of traffic passing between the Ohio River and Atlanta, but they use every effort to induce Atlanta to purchase her supplies in the Northwest, so that they may secure the carriage of them. The result is, that there is actual, aggressive, and effective competition as between the carriers whose lines extend from Cincinnati, Louisville, and other Ohio River supply markets, to Atlanta, as against the carriers whose lines extend from Baltimore, and other Northeastern supply markets, to Atlanta.

Fourth: New Orleans is situated on the Mississippi River, with deep water navigation to the ocean. There are also a number of railways entering at that point. The result is that New Orleans is an important supply market, and her merchants naturally desire to compete in Atlanta, with Baltimore, and the other Northeastern supply markets, as well as with Cincinnati, Louisville, and other Ohio River supply markets.

In order to enable the New Orleans merchants to compete in the Atlanta market, it becomes absolutely necessary that appellees and other rail carriers whose roads extend from New Orleans to Atlanta shall offer approximately as low rates on the various classes of freight as are accepted by the carriers whose lines extend from Baltimore, and other Northeastern supply markets, to Atlanta; or as are accepted by the carriers whose lines extend from Cincinnati, Louisville, and other Ohio River supply markets, to Atlanta.

If appellees and the other carriers whose roads extend from New Orleans to Atlanta should materially increase the rates be-

tween those points, it would be impossible for the New Orleans merchants to sell in the Atlanta market in competition with the merchants of Baltimore, and other Northeastern supply markets, or in competition with the merchants at Cincinnati, Louisville, and other Ohio River supply markets.

Such an increase of rates would not only drive New Orleans out of the Atlanta market, but it would also prevent appellees and other carriers from getting any traffic for transportation from New Orleans to Atlanta.

Fifth: The rates which can be obtained by appellees for the transportation of the various classes of freight from New Orleans to Atlanta are absolutely controlled by the following competitive circumstances and conditions, viz.:

1. Competition of markets.

(*a*) The competition between Baltimore, and other Northeastern supply markets, as against each other, for the trade of Atlanta.

(*b*) The competition between Cincinnati, Louisville, and other Ohio River supply markets, as against each other, for the trade of Atlanta.

(*c*) The competition of Baltimore, and other Northeastern supply markets, as against Cincinnati, Louisville, and other Ohio River supply markets, and against New Orleans as a supply market, for the trade of Atlanta.

2. Competition between carriers.

(*a*) The competition as against each other, of the various car-

riers whose lines extend from Baltimore, and other Northeastern supply markets, to Atlanta.

(*b*) The competition as against each other, of the various carriers whose lines extend from Cincinnati, Louisville, and other Ohio River supply markets, to Atlanta.

(*c*) The competition as against each other, of the various carriers whose lines extend from New Orleans to Atlanta.

(*d*) The competition as against each other, of the several classes of carriers last above designated as *a*, *b*, *c*.

The appellees aver that the competitive circumstances and conditions, above referred to, have existed for many years, and have resulted in establishing certain relative rates between said various supply markets and the city of Atlanta. The relation existing between said rates being as follows:

First: The rates on the numbered classes from Boston, New York, and Philadelphia to Atlanta, are certain fixed differentials higher than the rates from Baltimore to Atlanta.

Second: The rates on the numbered classes from Cincinnati, and from Louisville, to Atlanta, are made as low as the rates from Baltimore to Atlanta.

Third: The rates on the numbered classes from New Orleans to Atlanta are made 4 cents per 100 pounds less than the rates from Cincinnati and Louisville to Atlanta.

The relation existing between said rates is the result of frequent and disastrous rate wars between the rival carriers in the past; and any attempt to disturb said relation would immediately lead to a repetition of such wars.

The opposite diagram (1) sufficiently represents the relative position of said various supply markets with reference to Atlanta; and it also shows the lines of some of the competing carriers, which extend from said supply markets, respectively, to Atlanta.

The appellees aver that it is impossible to materially increase the rates from New Orleans to Atlanta, without driving New Orleans, and her carriers, out of the Atlanta market; unless the rates from said other supply markets to Atlanta, should be increased correspondingly.

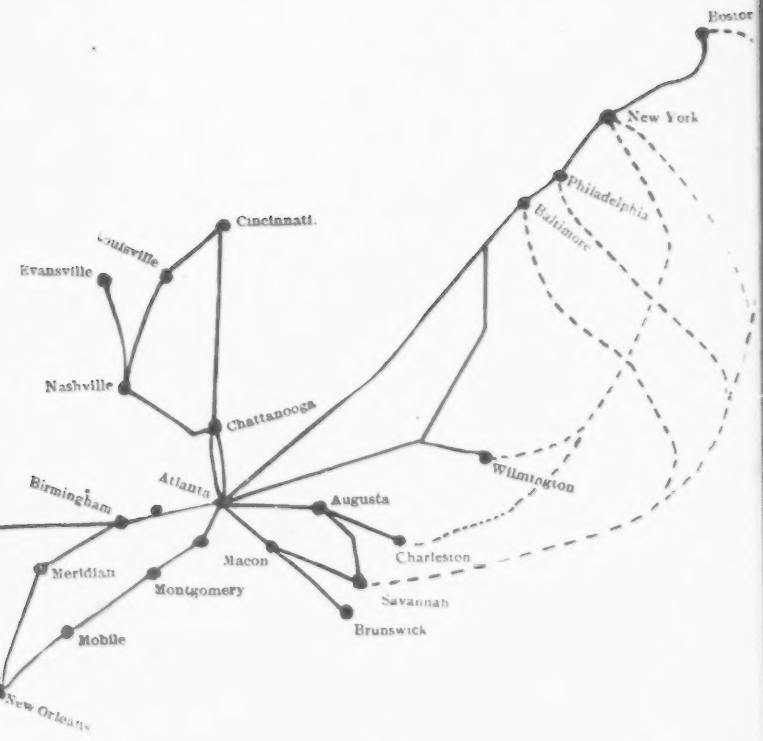
Similar competitive circumstances and conditions have resulted in establishing similar relations between the rates from said various supply markets, respectively, to the city of Montgomery; and also between the rates from said supply markets, respectively, to Atlanta, as compared with the rates from the same markets to Montgomery.

The following table, (B), will show the relation which has been thus established between the rates from New Orleans to Montgomery, and the rates from New Orleans to Atlanta:

TABLE B.

Rates from New Orleans to Montgomery, as compared with rates from New Orleans to Atlanta.

DIAGRAM NO. 1.


Boston
New York
Philadelphia
Baltimore
Cincinnati
Louisville
Evansville
Nashville
Chattanooga
Wilmington
Birmingham
Atlanta
Augusta
Macon
Charleston
Meridian
Montgomery
Savannah
Brunswick
Mobile
New Orleans

	CLASSES.												
	1	2	3	4	5	6	A	B	C	D	E	H	F
New Orleans to Montgomery	94	88	74	59	48	37	24	27	20	16	44	29	22
New Orleans to Atlanta.....	103	88	77	64	52	42	24	31	23	20	44	49	40

The appellees aver that it is impossible to increase the rates from New Orleans to Atlanta without making a corresponding increase in the rates from New Orleans to Montgomery; as to do so, would give to Montgomery an undue advantage of Atlanta, in the competition which has for many years existed between those two cities, as rival markets of consumption.

The appellees aver that the relation which exists between the rates from New Orleans to Montgomery and the rates from New Orleans to Atlanta, having been established by the competitive circumstances and conditions, above referred to, local non-competitive stations, such as La Grange, Hogansville, Newnan, Palmetto, and Fairburn, situated between Montgomery and Atlanta, have the choice of rates which can be made by adding the rates from New Orleans to Montgomery, to the rates from Montgomery to said local stations, respectively (as shown above in table A); or rates which can be made by adding the rates from New Orleans to Atlanta, to the rates from Atlanta to those stations, respectively (as shown below in table C).

TABLE C.

Rates from New Orleans to certain local stations on the Atlanta & West Point Railroad, arrived at by adding rates from New Orleans, La., to Atlanta, Ga., to rates from Atlanta to said local stations.

	Classes.												
	1	2	3	4	5	6	A	B	C	D	E	H	F
New Orleans to Atlanta	103	88	77	64	52	42	24	31	24	20	44	49	40
Atlanta to La Grange	40	36	32	29	22	17	17	17	9.5	9	22	....	19
New Orleans to La Grange	143	124	109	93	74	59	41	48	33.5	29	66	74	59
New Orleans to Atlanta	103	88	77	64	52	42	24	31	24	20	44	49	40
Atlanta to Hogansville	36	33	30	26	21	15	15	15	9	8.5	21	26	18
New Orleans to Hogansville	139	121	107	90	73	57	39	46	33	28.5	65	75	58
New Orleans to Atlanta	103	88	77	64	52	42	24	31	24	20	44	49	40
Atlanta to Newnan	30	26	24	22	18	13	13	13	8	7.5	18	22	16.5
New Orleans to Newnan	133	114	101	86	70	55	37	44	32	27.5	62	74	56.5
New Orleans to Atlanta	103	88	77	64	52	42	24	31	24	20	44	49	40
Atlanta to Palmetto	24	22	20	18	14	12	12	12	7.5	6.5	14	18	15
New Orleans to Palmetto	127	110	97	82	66	54	36	43	31.5	26.5	58	67	55
New Orleans to Atlanta	103	88	77	64	52	42	24	31	24	20	44	49	40
Atlanta to Fairburn	22	20	18	15	13	11	11	11	7	6	13	15	14
New Orleans to Fairburn	125	108	95	79	65	53	35	42	31	26	57	64	54

A comparison between said tables A and C will show that lower rates to La Grange, Hogansville, Newnan, Palmetto, and Fairburn, can be obtained from New Orleans by basing the rates on Atlanta, than by basing them on Montgomery.

Such a comparison is made in the following table D:

TABLE D.

Rates from New Orleans, La., to certain local stations on the Atlanta & West Point Railroad, based on Montgomery, compared with rates from New Orleans to said local stations based on Atlanta.

	Per 100 Pounds												Per bbl.
	1	2	3	4	5	6	A	B	C	D	E	H	F
New Orleans to La Grange, based on Montgomery	169	153	133	104	86	68	55	60	47	38.5	85	74	84.5
New Orleans to La Grange, based on Atlanta	143	124	109	93	74	29	41	48	33.5	29	66	74	59
Difference, favor Atlanta	26	29	24	11	12	9	14	12	13.5	9.5	19	.....	25.5
New Orleans to Hogansville, based on Montgomery	175	158	137	110	89	70	57	62	48.5	39.5	88	80	87
New Orleans to Hogansville, based on Atlanta	139	121	107	90	73	57	39	46	33	28.5	65	75	58
Difference, favor Atlanta	36	37	30	20	16	13	18	16	15.5	11	23	5	29
New Orleans to Newnan, based on Montgomery	182	165	144	115	94	72	59	64	45.5	40	93	85	83
New Orleans to Newnan based on Atlanta	133	114	101	86	70	55	37	44	32	27.5	62	71	55
Difference, favor Atlanta	49	51	43	29	24	17	22	20	13.5	12.5	31	14	27.5
New Orleans to Palmetto, based on Montgomery	185	168	146	117	95	73	60	65	50	41.5	90	87	90
New Orleans to Palmetto, based on Atlanta	127	110	97	82	66	54	36	43	31.5	26.5	58	67	55
Difference, favor Atlanta	58	58	49	35	29	19	24	22	18.5	15	32	20	35
New Orleans to Fairburn, based on Montgomery	189	171	148	119	96	75	60	67	50.5	42	89	89	91
New Orleans to Fairburn, based on Atlanta	125	108	95	79	65	53	35	42	31	26	57	64	54
Difference, favor Atlanta	64	63	53	40	31	22	25	25	19.5	16	32	25	37

Merchants at La Grange, Hogansville, Newnan, Palmetto, and Fairburn, respectively, have choice of rates from New Orleans based on Montgomery, or rates from New Orleans based on Atlanta; but as rates from New Orleans based on Atlanta are lower than they would be if based on Montgomery, appellees have adopted rates based on Atlanta, as being more to the advantage of merchants at La Grange, Hogansville, Newnan, Palmetto, and Fairburn, respectively.

Appellees aver that the reason why rates from New Orleans, when based on Atlanta, are higher to La Grange than rates from New Orleans to Hogansville, Newnan, Palmetto, or Fairburn, is that La Grange, though nearer to New Orleans, is farther than any other of said local stations from Atlanta; Atlanta being the point upon which all of said rates are based.

If the rates from New Orleans to said local stations were based on Montgomery, instead of Atlanta, though the rates to La Grange would be lower than the rates to any other of said local stations, yet the rates to La Grange would be higher than those which appellees now charge.

The distance from Atlanta to Fairburn is 18 miles; from Atlanta to Palmetto, 25 miles; from Atlanta to Newnan, 39 miles; from Atlanta to Hogansville, 58 miles; and from Atlanta to La Grange, 71 miles.

Appellees aver that the rates from Atlanta to said local stations, respectively, are fixed by the Georgia Railroad Commission, and are just and reasonable.

The rates from New Orleans to Atlanta are fixed by competition between markets, and competition between carriers, as explained above, and are just and reasonable.

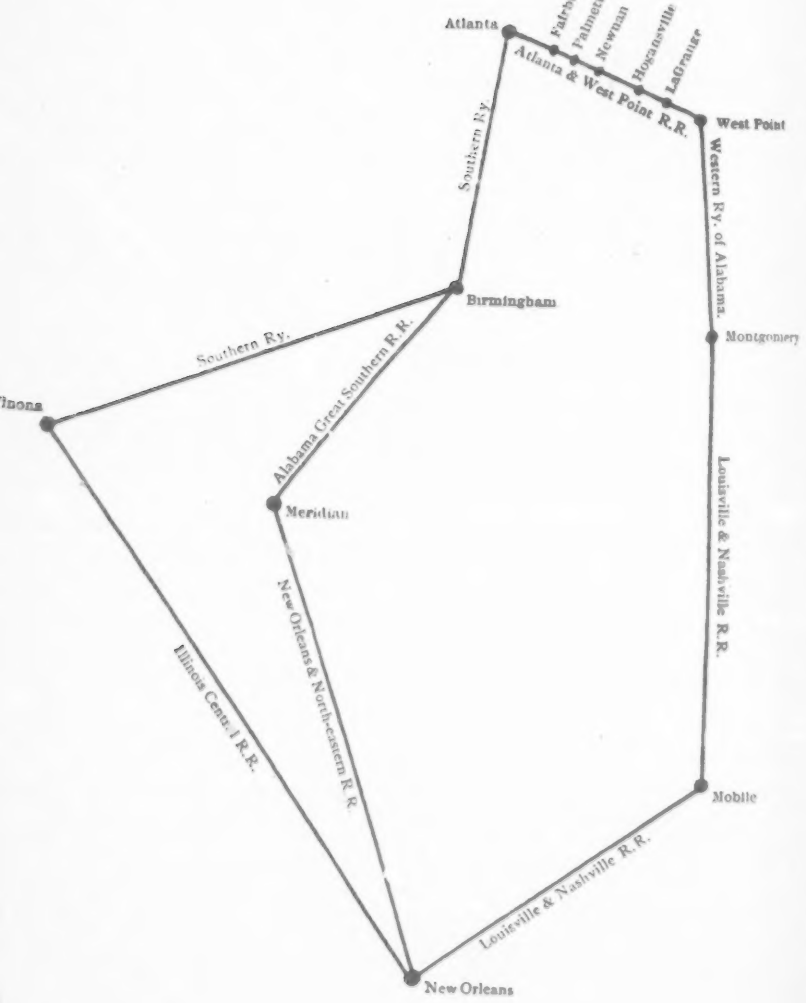
The rates charged by appellees from New Orleans to said local stations, respectively, are the sum of said competitive rates from New Orleans to Atlanta, added to said Georgia Railroad Commission rates; and therefore appellees' rates are themselves just and reasonable.

The reason why Fairburn, Palmetto, Newnan, and Hogansville, have lower rates than La Grange, is due alone to the fact that they are nearer than La Grange is to Atlanta; and it is not due to any favoritism or discrimination on the part of appellees.

The appellees aver that their principal competitors between New Orleans and Atlanta are:

First: The Illinois Central Railroad to Winona, and the Southern Railway from Winona to Atlanta; a distance of 646 miles.

DIAGRAM No. 2.


Atlanta
Fairburn
Palmetto
Newman
Hogansville
LaGrange
West Point
Atlanta & West Point R.R.
Western Ry. of Alabama.
Southern Ry.
Birmingham
Montgomery
Southern Ry.
Alabama Great Southern R.R.
Meridian
New Orleans & North-eastern R.R.
Louisville & Nashville R.R.
Illinois Central R.R.
Mobile
Louisville & Nashville R.R.
New Orleans

Second: The New Orleans & Northeastern Railroad to Meridian, the Alabama & Great Southern Railroad from Meridian to Birmingham, and the Southern Railway from Birmingham to Atlanta; a total distance of 526 miles.

The distance from New Orleans to Atlanta by appellees roads is 495 miles; or only 31 miles less than by the second route above described.

Said first and second routes are both in active, effective, and constant competition with appellees; and they carry all classes of freight from New Orleans to Atlanta at the same rates as are charged by appellees.

If appellees should attempt to materially increase the rates from New Orleans to Atlanta, and their said competitors should decline to increase their rates, appellees would simply lose the traffic; because it would all go by one or the other of said two competing routes.

The rates from New Orleans to Atlanta would remain precisely as they now are, and, by adding the Georgia Railroad Commission rates from Atlanta to Fairburn, Palmetto, Newnan, Hogansville, and La Grange, respectively, the rates from New Orleans to those stations would also remain precisely as they now are. La Grange would not be benefited in the least, and the only result would be to deprive the appellees of all participation in traffic from New Orleans destined to Atlanta; and to deprive New Orleans and Atlanta of the competition now afforded by appellees' route.

The opposite diagram (No. 2) sufficiently illustrates the principal competing routes between New Orleans and Atlanta:

Appellees aver that if they and their competitors who operate between New Orleans and Atlanta, should agree to increase the rates between those points, the traffic would simply be diverted from New Orleans to the rival supply markets referred to above. Merchants at Fairburn, Palmetto, Newnan, and Hogansville would purchase in those rival markets, ship their goods to Atlanta, and thence to their destination. They would have the same advantage in rates which they now have over La Grange; and the only result would be to destroy the commerce which now exists between New Orleans and Atlanta, and to deprive the carriers operating between those cities of such revenue as they have heretofore derived from that traffic.

Trans., pp. 8–23, inc.

IV.

The Hearing Before the Interstate Commerce Commission.

The case was heard before the Commission upon petition, answers, and testimony. The Commission filed its report and opinion.

See Trans., pp. 23–48, inc.

V.

The Order Made by the Interstate Commerce Commission.

The Commission made an order in the case.

The Commission ordered, among other things, that appellees, the Louisville & Nashville Railroad Company, the Western Railway of Alabama, and the Atlanta & West Point Railroad Company, each of them cease and desist:

1. From charging, collecting, or receiving "rates for the transportation of the several kinds or classes of freight from New Orleans, La., to La Grange, Ga., which, as a whole, or upon any article of merchandise, are in any respect unreasonable or unjust."

2. From charging, collecting, or receiving "the following unreasonable, unjust, and unlawful rates for the transportation from New Orleans, La., to La Grange, Ga., on articles embraced in the various classes of their freight classification; that is to say:

Classes; Rates in Cents Per 100 Pounds												Per barrel
1	2	3	4	5	6	A	B	C	D	E	H	F
143	124	109	93	74	59	41	48	33½	29	66	74	39

3. From charging, collecting, or receiving "rates or charges for the transportation of freight articles from New Orleans, La., to La Grange, Ga., which are equal to rates or charges contemporaneously in force over their railroads on like traffic carried from New Orleans, through La Grange, to Atlanta, Ga., *added to local rates in force on such traffic for local service over the Atlanta & West Point Railroad back from Atlanta to La Grange*, such combined rates having been found and held in and by said report and opinion of the Commission herein to be unreasonable, unjust, unduly prejudicial, and unlawful, and so unreasonable, unjust, unduly prejudicial, and unlawful *to the extent of such added local charges of the defendant the Atlanta & West Point Railroad Company*."

4. From charging, collecting, or receiving "any greater compensation in the aggregate for the transporting of freight articles from New Orleans, La., for the shorter distance to La Grange, Ga., than they contemporaneously charge, demand, collect, or receive for transporting the like kind of freight traffic from New Orleans for the longer distance over the same line, in

the same direction to Hogansville, or Newnan, or Palmetto, or Fairburn, Ga., the shorter being included within the longer distance."

5. From charging, collecting, or receiving "unreasonable, unjust, unduly prejudical, and unlawful rates for the transportation of freight articles from New Orleans to La Grange which are higher than aggregate rates contemporaneously charged, demanded, collected, or received by them, or either of them for the transportation of like kind of freight from New Orleans to Hogansville, or from New Orleans to Newnan, or from New Orleans to Palmetto, or from New Orleans to Fairburn."

6. "That said defendants (the appellees) and each of them in the transportation of freight articles from New Orleans, cease and desist from charging and collecting rates or compensation which subject complainant and other dealers and consignees at La Grange, Ga., their traffic, or the city of La Grange itself, to undue and unreasonable prejudice or disadvantage in any respect whatsoever, and also cease and desist from giving any undue or unreasonable preference or advantage to merchants, dealers, and consignees at *Atlanta*, Fairburn, Palmetto, Newnan, or Hogansville, or to their traffic, or to either of such cities or localities, namely, *Atlanta*, Fairburn, Palmetto, Newnan, or Hogansville, as against complainant and said other dealers and consignees at La Grange, or the city of La Grange itself."

"And it is further ordered and adjudged that said defendants (the appellees) be and they severally are hereby, recommended to so revise their schedule of rates and charges that the aggregate compensation charged and collected by them for the transportation from New Orleans to La Grange of freight articles embraced in the several freight classes shall not exceed reasonable, just, and lawful class rates in cents per 100 pounds and per barrel on Class F as follows, to wit:

Class.....	1	2	3	4	5	6	A	B	C	D	E	H	F
Rates..	103	88	77	61	52	42	24	31	24	20	44	49	40

(which are exactly the same as the rates from New Orleans to Atlanta); and that they make corresponding reductions or relatively reasonable and just changes in commodity rates, otherwise known as exceptions to class rates, from New Orleans to La Grange, aforesaid."

Trans., pp. 48–51, inc.

The appellees being advised that said order was not a lawful order, declined to obey it.

VI.

Proceedings in the Circuit Court.

The Interstate Commerce Commission filed a petition in the above entitled case, in the Circuit Court of the United States for the Southern District of Alabama, at Mobile, Ala., to enforce the order of the Commission made therein.

The appellees answered the same, denying the matters of equity therein alleged.

Additional testimony was taken in the Circuit Court by each party.

The testimony taken before the Commission was filed in the Circuit Court as evidence, for the appellees.

As stated above, in Section 1, the Circuit Court rendered a decree enjoining the appellees to obey the said order of the Commission; and from that decree the appellees prayed and obtained an appeal to the United States Circuit Court of Appeals for the Fifth Circuit.

Trans., pp. 418, 419.

VII.

Proceedings in the Circuit Court of Appeals.

The Circuit Court of Appeals ordered that the decree of the Circuit Court be remanded to said Circuit Court, with instructions to set aside its decree adjudging that the order of the Commission be enforced, and dismiss the application made for that purpose, with costs; the whole to be without prejudice to the right of the Commission to proceed upon the evidence already introduced before it, or upon such further pleadings and evidence as it may allow to be made or introduced, to hear and determine the controversy according to law.

Trans., p. 423.

The Interstate Commerce Commission filed a petition for rehearing (Trans., pp. 423, 426); which was denied by the Court.

Trans., p. 426.

Said Commission, therefore, appealed to this Court.

Trans., p. 427.

VIII.

The Circumstances and Conditions which Affect the Transportation of Property from New Orleans to Atlanta.

The Commission finds and reports that "Atlanta had a population of 64,000 in 1890, and this is estimated to have since increased to 100,000."

Trans., p. 32.

The Commission finds and reports that for the year ending June 30, 1895, the tonnage carried by the Atlanta & West Point Railroad, shipped from New Orleans to Atlanta, amounted to 6,773 tons; which was more than sixty times the tonnage carried over the same line for the same period from New Orleans to La Grange.

Trans., p. 40.

And it was more than sixty times the amount of tonnage carried over the same line for the same period from New Orleans to all local points on the Western Railway of Alabama and Atlanta & West Point Railroad, between Montgomery and Atlanta.

Trans., p. 91.

Mr. Lutz, Traffic Manager of the Atlanta & West Point Railroad and the Western Railway of Alabama, testifies that the revenue derived by appellees' lines for the year ending June 30, 1895, on traffic from New Orleans to Atlanta was $13,470.19; while on traffic from New Orleans to La Grange it was only $262.70.

Trans., p. 103.

The Commission finds and reports that "some ten or twelve lines are stated in testimony to compete for business between New Orleans and Atlanta;" that in point of fact "three roads take Atlanta traffic out of New Orleans," viz: "The Louisville & Nashville, Illinois Central, and New Orleans & Northeastern;" that "four roads deliver such in Atlanta," viz.: "The Atlanta & West Point, the Southern, the Central of Georgia, and Western & Atlantic;" that defendants' (appellees') route is the shortest, it being 496 miles; that the next shortest route to Atlanta in which none of the defendants (appellees) participates is via the New Orleans & Northeastern Railroad, and the Southern Railway, 526 miles; that the next shortest route is via the Illinois Central Railroad, and the Southern Railway, 647 miles;

and that the longest is via Illinois Central, Nashville, Chattanooga & St. Louis, and Western & Atlantic Railways, 882 miles.

The Commission also finds and reports that the Central of Georgia can receive traffic destined to Atlanta, at Montgomery, from the Louisville & Nashville Railroad, one of the appellees; and by that route Atlanta is 644 miles from New Orleans.

Trans., p. 29.

Mr. Knott, Vice President of the Louisville & Nashville Railroad, who had direction and supervision of the traffic of that company, testifies that there are some ten or twelve different routes competing for traffic between New Orleans and Atlanta; he specifies the different companies whose roads form portions of each of said routes; and he gives the distance from New Orleans to Atlanta by each of said routes.

Trans., p. 127.

Mr. Knott testifies that the Illinois Central Railroad actively competes for traffic at New Orleans; and that it secures traffic both via Winona, Miss., in connection with the Southern Railway; and via Jackson, Tenn., in connection with the Nashville, Chattanooga & St. Louis Railway.

He testifies that the New Orleans & Northeastern Railroad also solicits and secures a large portion of the traffic, by different connections, through Meridian and Selma; or Meridian and Birmingham; or Birmingham and Chattanooga.

Trans., p. 128.

Mr. Lutz testifies that the Illinois Central Railroad and the New Orleans & Northeastern Railroad actively compete at New Orleans with the Louisville & Nashville Railroad for the transportation of traffic from New Orleans to Atlanta.

Trans., p. 106.

Mr. Knott testifies that "none of the roads leading from New Orleans to Atlanta can be said to have made any rate at all. They simply accepted certain conditions which they found at Atlanta; and by agreement, or by arbitration, arranged to meet those conditions uniformly, by each of the several ten or twelve different routes competing for the business. But, as a matter of fact, the railroads can hardly be said to have made any rate at all; they have to accept the rates made."

Trans., pp. 130, 131.

The Commission finds and reports that for the year ending March 31, 1896, the total tonnage carried from New Orleans to Atlanta amounted to		11,113.20 tons.
Of which the Louisville & Nashville Railroad carried.....	7,636.05	
The Illinois Central Railroad carried..	1,523.00	
The New Orleans & Northeastern Railroad carried.....	1,954.15	—11,113.20 tons.

Trans., pp. 39, 85, 139, 140.

Mr. Lutz testifies that car-load freights, such as usually move from New Orleans to Atlanta, are, as a rule, loaded by the shipper; that they are loaded in solid car-load lots; that they are billed solid; that there is no rehandling at intermediate points; that "it goes right through to Atlanta;" and that it is there unloaded by the consignee.

Trans., p. 108.

Mr. Lutz also testifies that they always have a sufficient amount of freight at large cities, such as New Orleans, and Mobile, to load a solid car for Atlanta; that freights are loaded "right through;" and that there is no handling at junction points.

Trans., p. 109.

The Commission finds and reports that "the engines hauling trains running from Montgomery to Atlanta, haul an average of nearly twenty-one loaded cars, and their capacity is sufficient to haul ten more. But it is testified that traffic from New Orleans to Atlanta usually moves in car loads, either as a full car-load shipment or because there is daily a sufficient number of less than car-load shipments from New Orleans to Atlanta to make up a car load; and that the Atlanta cars go through from New Orleans to Atlanta without break of bulk or transfer at Montgomery, or other rehandling."

See also Trans., p. 107, 137.

The Commisssion finds and reports that Atlanta "is served by competing through lines of transportation from all sections, and the various primary markets of the country are in competition for Atlanta trade."

Trans., p. 32.

Again: In speaking of the competition at Atlanta, the Commission says:

"This includes both the competition of markets for supplying goods to Atlanta, and the competition of carriers for the carriage of freights to that point from New Orleans, and from Western, Northern and Northeastern cities."

Trans., p. 28.

Mr. Knott testifies that the various classes of freight which are shipped from New Orleans to Atlanta, over the lines of the appellee companies, are also shipped to a large extent from Cincinnati, Louisville, and other points on and beyond the Ohio River, to Atlanta.

Trans., p. 121.

Mr. Knott testifies that the various classes of freight which

are shipped from New Orleans to Atlanta over the lines of the appellee companies, are also shipped to a very great extent from other markets of supply, such as Boston, New York, Philadelphia, and Baltimore, to Atlanta.

Trans., p. 113.

Mr. Knott testifies that the rates on the various classes of freight from Boston, New York, Philadelphia, and Baltimore, to Atlanta are controlled by the rates of the water lines from Baltimore, Philadelphia, New York, Boston, and Providence to Charleston, Savannah, or Brunswick, added to the rates from Savannah, or Brunswick, or Charleston, to Atlanta. The rates from Savannah and Brunswick to Atlanta are fixed or controlled by the Georgia Railroad Commission; and they are also further affected by the competition of steamboats in the Savannah River, which enables rates to be made, up to the interior of the State, as far as Augusta, by the all-water lines from Eastern cities to Augusta; and the rates thus made to Augusta in turn affect the rates that can be charged from Savannah to Atlanta. In the transportation of freight from Boston, New York, Philadelphia, and Baltimore, respectively, to Atlanta, the all-rail lines on certain classes of traffic compete at a little higher rate than the rail and water rate; such higher all-rail rate being supposed to represent the slight difference in the service. There is, however, only a very small percentage of traffic carried from the cities of New York, Philadelphia, Boston, and Baltimore to Atlanta by the all-rail routes in competition with the rail and water lines. The all-rail lines probably get some business at some intermediate point, or some interior point not reached by the steamers, but not at the cities of New York, Philadelphia, Boston, or Baltimore.

Trans., pp. 119, 120.

The Commission finds and reports that for the year ended March 31, 1896, the tonnage to Atlanta was:

	TONS.
By all routes from Eastern and Northeastern points, including the Atlantic seaboard	170,365.26
By all routes from Ohio and Mississippi River points, and via Lexington, Ky., and from Nashville, Tenn., Johnsonville, Tenn., Florence, Sheffield, and Riverton, Ala	137,460.90
By all routes from New Orleans to Atlanta	11,113.20
Total	318,939.36

Trans., pp. 39, 85, 86, 140, 141.

The Commission finds and reports that if the figures in testimony relating to revenue from New Orleans traffic to Atlanta and to La Grange are correct, appellees would, by increasing rates from New Orleans to Atlanta so as to make them as high as the present rates from New Orleans to La Grange, lose $13,470.19 more or less in a given year, provided such action was taken without the concurrence of the competing lines to Atlanta; because shippers would doubtless then choose the cheaper route.

Trans., pp. 43, 44.

See also Trans., p. 103.

The Auditor of the Atlanta & West Point Railroad, and of the Western Railway of Alabama, testifies that if the rates on all interstate freight to and from La Grange were so adjusted as not to exceed the rates to and from either of the four competitive points through which the traffic passes, said line would lose $5,723.28 per annum; which amount represents 37 per cent of the local interstate freight earnings at La Grange. He further testifies that if an adjustment of rates were made on interstate freight to and from all local stations on the line of the Atlanta & West Point Railroad, and Western Railway of Alabama, so that the rates to and from said local stations should not exceed the rates to and from the competitive points through which the traffic

passes, it would result in a decrease in the gross freight earnings of said roads of $63,331.56; which amount represents 41.6 per cent of the total freight earnings to and from local stations. He further testifies that if an adjustment of rates on freight to and from each of the four competitive points on the Atlanta & West Point Railroad, and the Western Railway of Alabama, were made upon the basis of the rates to and from local stations on said roads, it would result in a decrease in the gross freight revenue of said roads of $133,596.24 per annum, by reason of loss of competitive business; which amount represents 24.7 per cent of the total freight earnings of said road.

Trans., pp. 89, 90.

The President of the Atlanta & West Point Railroad, and of the Western Railway of Alabama, testifies that considering those two roads as one line, a reduction of $63,331.66 in the gross earnings, not accompanied by a decrease in the expenses, would reduce the average yearly surplus of the past five years, applicable to dividends, to a point where it would leave only a possible dividend of 2.33 per cent per annum; and that a reduction of $133,596.24 in the gross earnings, not accompanied by a decrease in the expenses, would reduce the average yearly surplus of the last five years, applicable to dividends, to a point where it would leave only a possible dividend of .62 of one per cent per annum.

Trans., p. 98.

Mr. Lutz testifies that the revenue per ton per mile, which the Atlanta & West Point Railroad, and the Western Railway of Alabama, realize for the transportation of the several classes of freight passing from New Orleans to Atlanta, exceeds the additional cost of the movement of said freight.

Trans., p. 107.

IX.

The Circumstances and Conditions which Affect the Transportation of Property from New Orleans to La Grange, Hogansville, Newnan, Palmetto and Fairburn.

The Commission finds and reports that La Grange is a city of 4,000 or 5,000 inhabitants, with thirty or forty business establishments; and that complainant is the only merchant who has seriously attempted to engage in the wholesale trade at that point.

Trans., p. 31.

The Commission finds and reports that for the year ending June 30, 1895, appellees' line carried a total of only 100 tons of freight from New Orleans to La Grange; and of that total, 30 tons consisted of sugar and molasses.

Trans., p. 34.

The Commission finds and reports that the tonnage carried by appellees' line from New Orleans to La Grange for the year ending June 30; 1895, was less than one-sixtieth of the tonnage carried over the same line, during the same period, from New Orleans to Atlanta.

Trans., pp. 40, 41.

Mr. Lutz testifies that the revenue derived by appellees' line for the year ending June 30, 1895, on traffic from New Orleans to La Grange was only $262.70; and that the revenue derived from traffic from New Orleans to Atlanta was about fifty times as much as the revenue derived from traffic from New Orleans to La Grange.

Trans., p. 103.

Mr. Knott testifies that there is no such competition at La Grange as at Atlanta.

Trans., p. 128.

Complainant Calloway testifies that the Macon & Birmingham Railroad, and the Atlanta & West Point Railroad, are the only railroads at La Grange; and that there is no navigable river at that place.

Trans., p. 82.

See also Trans., pp. 356, 357.

Mr. Calloway testifies that the Macon & Birmingham Railroad "does not seem to be a competitive line;" and that it "has never been acknowledged to be a competitive line."

Trans., p. 80.

Mr. Calloway further testifies that "the Macon & Birmingham has always been cut off. They have no connection with anything."

Trans., p. 83.

Mr. Lutz testifies that the Macon & Birmingham Railroad runs from La Grange to Sofkee, a distance of 97 miles; and that the distance from Sofkee to Macon over the Georgia Southern & Florida Railroad is 8 miles.

Trans., p. 357.

Poor's Manual shows that the Macon & Birmingham Railroad has only four locomotives, and 192 freight cars.

It shows that for the year ending June 30, 1897:

The Gross Earnings of that road were..	$61,970 00
Its Operating Expenses were.....	83,057 00
Its Deficit from Operations was.....	$21,087 00

Trans., p. 257.

Mr. Lutz specifies five through routes that might be formed from New Orleans to La Grange by using the Macon & Birmingham Railroad as a part of each of said routes, and without using any part of appellees' lines to form either of said routes. He testifies, however, that it would be necessary to use either the Southern Railway, or the Central Railway of Georgia, in order to form any one of said routes.

Trans., pp. 357, 358.

He states two reasons why the Southern Railway would not be willing to accept its proportion of the same through rate on traffic from New Orleans destined to La Grange, as it, and its connections, now charge on traffic from New Orleans destined to Atlanta.

First: The rate per ton per mile of the Southern Railway would be less on traffic from New Orleans to La Grange than it is on traffic from New Orleans to Atlanta.

Second: The rate of the Southern Railway and its connections from New Orleans to La Grange would be less than the rates now charged by them from New Orleans to local stations of the Southern Railway, which are nearer than La Grange is to New Orleans.

Trans., p. 358.

He states that the reason why the Central Railway of Georgia would not be willing to accept its proportion of the same through rate on traffic from New Orleans destined to La Grange as it, and its connections, now charge on traffic from New Orleans destined to Atlanta, is that the rate charged by the Central of Georgia Railway, and its connections, from New Orleans to La Grange would be less than the rates now charged by them from New

Orleans to local stations of the Central Railway of Georgia, which are nearer than La Grange is to New Orleans.

Trans., pp. 358, 359.

The Commission finds and reports that the appellees, instead of hauling La Grange freight through in the trains used for Atlanta traffic from Montgomery, carry such freight by local service from Montgomery, at which point new trains are made up for all traffic destined to points on the "Atlanta & West Point-Western of Alabama System," and the rehandling of La Grange freight at Montgomery is incidental to the transportation method of that system.

Trans., p. 42.

The Commission finds and reports that cars, engines, and crews engaged in hauling New Orleans freight from Montgomery to La Grange are also engaged in hauling such and other freight to other stations; in hauling freight between local stations; and in hauling freight shipped locally from Montgomery. Such local service is also employed in transporting freight from Atlanta to points on this system, and in doing generally the local business of the line.

Trans., p. 42.

The Commission finds and reports that carrying "New Orleans-La Grange" freight on local trains relieves the Atlanta & West Point Railroad from the necessity of stopping through trains carrying traffic destined to Atlanta and various points beyond, which traffic is shipped from New Orleans and other points, via Montgomery, over that part of appellees' through line.

Trans., p. 46.

The Commission finds and reports that it is probably true that the Atlanta & West Point Railroad can most cheaply transport the present through tonnage from New Orleans to La Grange, amounting to only 100 tons for a given year, by its separate local trains from Montgomery to La Grange and other local stations.

Trans., p. 46.

The Commission finds and reports that it is testified that New Orleans freight destined to La Grange is generally in less than car loads, and is transferred at Montgomery, being checked out from the car to the platform, and then put into a car to be hauled by the local freight train from Montgomery to La Grange, and that altogether it may be handled from five to a dozen times; that transporting New Orleans traffic to La Grange is done at three times the expense incurred by the carrier in moving New Orleans freight to Atlanta.

Trans., p. 41.

See also Trans., p. 108.

Mr. Knott testifies that "we" have had an investigation made as to the cost of handling freight on way-freight trains at intermediate points as compared with through freights, and find the difference to be from seven to ten times as great on the way-trains.

Trans., pp. 132, 133.

X.

How Rates are Made from New Orleans to Atlanta.

The Commission finds and reports that competition at Atlanta has been active for many years, and during that period the carriers have indulged in a number of rate wars, whereby rates affected from points of shipment to Atlanta, and other principal points in the South, were, for the time being, made abnormally low.

Trans., p. 32.

Mr. Lutz testifies that "competition makes the rate to Atlanta;" that competition from Eastern markets will naturally make the rates from New Orleans; and that on the same class of goods the appellees have to make a similar rate, in order to allow New Orleans to compete.

Trans., pp. 109, 359, 360.

Mr. Knott testifies that there is actual competition, and to a very large extent, between such markets as Boston, New York, Philadelphia, Baltimore, Cincinnati, Louisville, and New Orleans, for the sale of the various classes of freight in the Atlanta market; and that if the appellee railroads should increase the rate on the various classes of freight from New Orleans to Atlanta, so that they would be the same as the rates from New Orleans to La Grange, the effect would be to divert such traffic as is now shipped from New Orleans, and turn it to Baltimore, Cincinnati, and Louisville, or to other markets which compete with New Orleans; that it would also divert the traffic from the lines which run from New Orleans to Atlanta, and turn it to lines which run from other competing markets to Atlanta; or, in other words, unless there should be a corresponding advance in rates from Baltimore, Louisville, and Cincinnati, an advance

in rates from New Orleans would divert the traffic from New Orleans to Baltimore, Louisville, and Cincinnati.

Trans., pp. 125, 133, 134.

Mr. Knott testifies that if the various rail lines which operate between New Orleans and Atlanta could secure an agreement among themselves to advance the rates from New Orleans to Atlanta, so as to make them as high as the rates from New Orleans to intermediate points, the first effect would be to stop the movement of traffic between New Orleans and Atlanta. And even if those lines could secure an agreement with the lines which run from Louisville, Cincinnati, Chicago, and St. Louis, to increase the rates from those cities to Atlanta, so as to make them as high as the increased rates from New Orleans to Atlanta, it would have the effect to divert traffic to the Eastern cities; not only from New Orleans, but also from Louisville, Cincinnati, Chicago and St. Louis. He testifies that it would be impossible to induce the Eastern all-rail lines to increase their rates from Boston, New York, Philadelphia, and Baltimore, so as to make them as high as the increased rates from New Orleans; because the steamships working from Boston, New York, Philadelphia, and Baltimore to Brunswick, Savannah, and Charleston are at liberty to make any rates they please; and those steamships would be glad to get the business not only from Baltimore, but from other points. *It follows therefore that the railroads could not change the rates to Atlanta.* Cincinnati, Louisville and New Orleans might retire from the business; but Atlanta would still have access to markets regardless of what rates the Atlanta & West Point Railroad might make to Atlanta.

Trans., p. 134.

Mr. Knott testifies that there is a certain relation for making rates which exists between the rates charged from Boston, New York, Philadelphia, and Baltimore to Atlanta, and the rates which are charged from Louisville, Cincinnati, and other Ohio River points, to Atlanta.

The rates from Philadelphia, New York, and Boston are the same from each of those points to Atlanta. The rate from Baltimore to Atlanta is less than the rate from Philadelphia. That adjustment as between the Eastern cities is brought about by the fact that the different steamship lines competing actively with each other from Philadelphia, New York, and Boston make the same rates to the South Atlantic ports to which they sail, whichever port that may be; say, Savannah, for instance; and of course that will make a uniform rate from those three Eastern cities, via Savannah, to Atlanta or Macon, or to some other interior Georgia point. The steamers sailing from Baltimore make a somewhat lower rate to the South Atlantic ports than the rate from Boston, New York, or Philadelphia to the same port.

The relation established as between the rates from Baltimore, and the rates from Cincinnati and Louisville, to Atlanta, grew out of the conditions which required that there should be some understanding between competing lines as to the rates on similar kinds of traffic from different and competing points of shipment. The necessity for that has existed ever since there has been competition in the carriage of through shipments of similar kinds of freight from the East, and from the West, into the South. That competition began almost immediately after the war, when through lines for handling freight between (from ?) Boston points began to be inaugurated. The steamers running from the different ports of Baltimore, Philadelphia, New York, and Boston to the different South Atlantic ports began to issue through rates, and through bills of lading, to interior Southern points, in connection with rail lines extending from Savannah, Brunswick, and Charleston to these points. And in the same way, the rail lines extending from the Ohio River into the South, from Louisville or Evansville, began to issue through rates, and through bills of lading, from those points, to points in Georgia, Atlanta for instance, and to solicit from their connections beyond Louisville, Evansville and Cincinnati, traffic destined to Atlanta. As

the routes which led from Chicago or from Indianapolis, for instance, to Baltimore and to New York, were also competing for business from those points destined to Atlanta, Macon, or Augusta, it followed that lines which were competing for the same traffic, originating at the same point (which latter lines proposed to carry the traffic down across the Ohio River through Nashville and Chattanooga into Atlanta and Macon), had to have some kind of an understanding as to what rates were to be quoted by the different routes; and that understanding was arrived at through conferences of traffic officials, and through rate wars, and through arbitration, and sometimes through traffic agreements, or associations.

There is also a certain relation between the rates from such points as Jeffersonville, Evansville, Memphis, Vicksburg, and New Orleans to Atlanta, and the rates that obtain from Cincinnati and Louisville to Atlanta. This relation of rates was also rendered necessary because of the conditions which required that there should be some understanding as between the lines coming from the East, and the lines coming from the West, into Atlanta, as to what rates should be charged on the same articles shipped from different competing markets. It was also necessary that there should be some understanding as to what the rates should be from Western points as related one to the other, on articles of the same kind, shipped to a common point of destination such as Atlanta; and the agreement in that respect was reached through the same process as the agreement with regard to Eastern rates; that is, there were contentions and rate wars, and then agreement, and then arbitration. The present relations of rates as between Louisville, Cincinnati, Evansville, and Cairo, and Mississippi River points such as Memphis, Huntington, Vicksburg, and New Orleans, has been in effect for more than ten years. The present basis was fixed first by Mr. James R. Ogden, who sat as arbitrator in March, 1886, and established a basis of rates that should obtain in making up tariffs from Cin-

cinnati, Louisville, Evansville, Henderson, Cairo, Memphis, Huntington, Vicksburg, and New Orleans to Chattanooga, Atlanta, Macon, Birmingham, Montgomery, and a large territory south of the Ohio River, and east of the Mississippi. An appeal was taken from Mr. Ogden's decision to the late Hon. Thomas M. Cooley. Judge Cooley reviewed Mr. Ogden's decision; and after arguments submitted by the lines in interest, rendered his decision in writing on May 29, 1886. He made some changes in Mr. Ogden's basis of rates; but taken as a whole, he confirmed it.

Trans., pp. 121, 122, 123, 124, 205 to 216.

The Commission finds and reports that the relative rates to Atlanta have been the subject of arbitration and agreement between interested lines at different times during the last twelve or more years; and the basis so established has been substantially returned to by the carriers upon cessation of the rate wars which have prevailed during that period. The Commission also reports that the all-rail rates from the East,—New York, Philadelphia, Boston, and Baltimore,—are made with reference to rates in force via the sea and rail lines from those points to Atlanta.

Trans., p. 32.

The Commission finds and reports that "the normal long established relation of rates to Atlanta," from New York, Philadelphia, Boston, Baltimore, Cincinnati, and Louisville, is as indicated by the following statement of rates, in cents per hundred pounds, on first-class traffic:

New York, Philadelphia, and Boston, all-rail	$1 26
Baltimore, all rail	1 19
New York, Philadelphia, and Boston, sea and rail	1 14
Baltimore, sea and rail	1 07
Cincinnati, all rail	1 07

Louisville, all rail..... $1 07
New Orleans, all rail..... 1 03
Trans., p. 32.

It will be noticed that the first-class rate to Atlanta, whether by all rail or by sea and rail, is the same from Boston, as from New York or Philadelphia; that the first-class rate from Baltimore to Atlanta, whether by all rail or by sea and rail, is 7 cents less than the rate from Boston, New York, and Philadelphia; that the first-class rate, sea and rail, from Baltimore is the same as the all-rail rate from Cincinnati and Louisville; and that the first-class rate, all rail, from New Orleans to Atlanta, is 4 cents less than the sea and rail rate from Baltimore; and 4 cents less than the all-rail rates from Cincinnati and Louisville.

The Commission finds and reports that the rates from Cincinnati and Louisville to Atlanta are the same on numbered classes as the sea and rail rates from Baltimore; but considerably lower on the lettered classes; and that class rates from New Orleans to Atlanta are 4 cents less than from Cincinnati and Louisville.

Trans., p. 33.

There is also a certain relation or basis for making rates to Montgomery, Ala.

The Commission finds and reports that "the general relation of rates to Montgomery, Ala., also established by general agreement among the lines interested," is as indicated by the following statement of rates, per hundred pounds, on first-class traffic:

New York and Boston, all rail..... $1 26
Philadelphia, all rail..... 1 20
Baltimore, all rail..... 1 18
New York and Boston, sea and rail 1 14

Philadelphia, sea and rail	$1 08
Baltimore, sea and rail	1 06
Cincinnati, all rail	1 08
Louisville, all rail	98
New Orleans, all rail	89

Trans., p. 33.

By comparing "the relation of rates to Atlanta" with "the relation of rates to Montgomery," as set forth above, it will be seen that the first-class rate, whether by all rail, or by sea and rail, from New York and Boston, is the same to Montgomery as to Atlanta; that the first-class rate, whether by all rail, or sea and rail, from Philadelphia, is 6 cents less to Montgomery than to Atlanta; that the first class rate whether by all-rail or by sea and rail from Baltimore is 1 cent less to Montgomery than to Atlanta; that the first-class rate from Cincinnati to Atlanta is 1 cent less than to Montgomery; that the first-class rate from Louisville is 9 cents less to Montgomery than to Atlanta; and that the first class rate from New Orleans is 14 cents less to Montgomery than to Atlanta.

Mr. Knott testifies that if the rates from New Orleans to Atlanta were increased, and no corresponding increase were made in the rates from New Orleans to Montgomery, the effect would be to divert traffic from Atlanta to Montgomery; unless Atlanta could be supplied from some other market.

Trans., p. 126.

Mr. Knott testifies that the all-rail rates between New Orleans and Montgomery cannot be increased; because they are as high as can be obtained in competition with boats from New Orleans to Mobile, and boats on the Alabama River, plying between Mobile and Montgomery. He testifies that during the boating season it is of almost daily occurrence to have freight shipped

from New Orleans to Mobile, paying the local to Mobile, and then paying the boat rate from Mobile to Montgomery; thereby getting a somewhat lower rate than the direct all-rail rate from New Orleans to Montgomery. He testifies that it is entirely practicable for Montgomery merchants to secure their freights at the present rates, or at rates lower than the present rates, if an attempt were made to advance the rates from New Orleans to Montgomery by the all-rail lines.

Trans., p. 126.

Mr. Lutz testifies that were it not for competition, especially from the East, higher rates might be reasonably charged from New Orleans to Atlanta.

Trans., pp. 359, 360.

Mr. Knott testifies that the rates from New Orleans to Atlanta would be at least as high as the rates from New Orleans to La Grange, Hogansville, Newnan, Palmetto, and Fairburn, "if competition had not pulled down the rates at Atlanta."

Trans., p. 119.

XI.

How Rates are Made from New Orleans to La Grange, Hogansville, Newnan, Palmetto, and Fairburn.

The Commission finds and reports that through rates from New Orleans to La Grange, Hogansville, Newnan, Palmetto, and Fairburn "are made by a combination of the joint rate (from New Orleans) to Atlanta, and the local rate of the Atlanta & West Point Railroad Company back over the same line to destination;" etc.

See also Trans., p. 116, 117.

The Commission finds and reports that La Grange rates (from New Orleans) are, with a single exception, combinations of rates to and from Atlanta. The exception is class H, which is based on Montgomery.

Trans., p. 31.

See also, Trans., pp. 369, 370.

The reason why the rate on class H is an exception, and is based on Montgomery, is, that rates from New Orleans, from Ohio River points, and from Memphis, etc., to Montgomery, are largely affected by water competition on the Alabama River; and the rate on class H (which is whisky, wine, etc., in barrels), from New Orleans to Montgomery was so adjusted as to prevent that class of articles from being shipped from New Orleans to Mobile at the current rate, and then shipped from Mobile to Montgomery by river.

Trans., pp. 371, 372.

The Commission finds and reports that the rates to La Grange from Boston, New York, Philadelphia, Baltimore, Cincinnati, and Louisville are the rates from Boston, New York, etc., to Atlanta, added to the local from Atlanta to La Grange.

Trans., p. 32.

The Commission finds and reports "that changes in rate conditions at Atlanta have ordinarily worked similar changes in rates to La Grange. Thus a first-class rate of $1.43 on traffic from New Orleans to La Grange, made by adding the $1.03 rate to Atlanta and the 40 cent local from Atlanta to La Grange, would be reduced to 80 cents, if, during a rate war, the first-class rate from New Orleans to Atlanta should be as low as 40 cents."

Trans., p. 32.

Mr. Knott testifies that the rates from New Orleans to La Grange, Hogansville, Newnan, Palmetto, and Fairburn would,

if other conditions permitted, be made on the basis of the rates from New Orleans to Montgomery, added to the rates from Montgomery to those points.

Trans., p. 118.

He testifies, however, that rates constructed upon that basis would be higher than those which are now charged by the defendants.

Trans., pp. 118, 119.

The reason why rates to those points from New Orleans are not based on Montgomery, is, as explained by Mr. Knott, "because of the effect of competition enjoyed, respectively, at each one of those stations; that is, the effect of competition which has pulled down the rates at Atlanta; the conditions at Atlanta not permitting the rates from New Orleans to that point to be made the maximum that they would be, if distance alone controlled the Atlanta & West Point, and the Western Railway, and the Louisville & Nashville, in making the rates; and the rate at Atlanta being reduced through the effect of these conditions at Atlanta, the benefit of those reductions in the Atlanta rate extends back over the Atlanta & West Point Railroad, so that the rates to Fairburn, and Palmetto, and Newnan, and La Grange, and Hogansville, are lower than they would be, except for the low rate in effect from New Orleans to Atlanta."

Trans., p. 119.

Mr. Knott testifies that the rates from New Orleans to La Grange are less than a combination of the rates from New Orleans to Montgomery, added to the rates from Montgomery to La Grange.

Trans., p. 117.

The Commission finds and reports that "the local rates in either direction between points on the Atlanta & West Point

Railroad are substantially in accordance with the maximum distance rates allowed by the Georgia Railroad Commission," etc.

Trans., p. 28.

See also Trans., pp. 105, 370.

Mr. Knott testifies that if distance controlled, the rates from New Orleans to Hogansville, Newnan, Palmetto, and Fairburn would be higher, or certainly not lower, than the rates from New Orleans to La Grange.

Trans., p. 118.

Table A, on page 14 of appellees' answer to the petition filed before the Commission, shows what the rates would be from New Orleans to La Grange, Hogansville, Newnan, Palmetto, and Fairburn, respectively, if it were possible for the appellees to use distance as a controlling factor in making said rates; and said table shows that the rates from New Orleans to Hogansville, Newnan, Palmetto, and Fairburn, would, in each and every instance, be higher on each and every class, than the rates from New Orleans to La Grange.

Trans., p. 11.

Mr. Knott testifies that Table A, referred to above, gives correctly "the sum of the rates from New Orleans to Montgomery, and from Montgomery to each of the points named, at the time the answer was made."

Trans., pp. 118, 119.

Mr. Lutz testifies that the defendants cannot charge more from New Orleans to Palmetto, Fairburn, Newnan, and Hogansville, than a combination of the rates from New Orleans to Atlanta with the local rate from Atlanta to destination, "as shippers would simply ship to Atlanta and ship right back."

Trans., pp. 112, 113.

PART SECOND.

ARGUMENT.

XII.

THE MOST RECENT CASES ON THE QUESTIONS INVOLVED.

Every principle of law involved in the case at bar has been heretofore decided by this Court.

The most recent cases on the subject are

181 U. S., p. 1, E. T. V. & G. Ry. Co. v. I. C. C., decided April 8, 1901.

181 U. S., p. 22, I. C. C. v. Clyde S. S. Co., decided April 8, 1901.

101 Fed. Rep., 779, S. P. Co. v. C. F. & I. Co., decided April 16, 1901.

All three of said cases have been decided since the report and opinion of the Commission in the case at bar was filed; which was on December 31, 1897.

Trans., p. 23.

XIII.

THE PRINCIPLE ESTABLISHED BY THIS COURT.

In the case of E. T. V. & G. Ry. Co. v. I. C. C., 181 U. S., pp. 18 and 19, this Court said:

"In a supposed case when, in the first instance, upon an issue as to a violation of the fourth section of the act, it is conceded

or established that the rates charged to the shorter distance point are just and reasonable in and of themselves, and it is also shown that the lesser rate charged for the longer haul is not wholly unremunerative and has been forced upon the carriers by competition at the longer distance point, it must result that a discrimination springing alone from a disparity in rates cannot be held, in legal effect, to be the voluntary act of the defendant carriers, and as a consequence the provisions of the third section of the act forbidding the making or giving of an undue or unreasonable preference or advantage will not apply.

"The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the *voluntary* and *wrongful* act of the carriers complained of as having given undue preference, and does not relate to acts *the result of conditions wholly beyond the control of such carriers.* To otherwise construe the statute would involve a departure from its plain language, and would be to confound cause with effect. For, if the preference occasioned in favor of a particular place by competition there gives rise to the right to charge the lesser rate to that point, it cannot be that the availing of this right is the cause of the preference, and especially is this made clear in the case supposed, since it is manifest that forbidding the carrier to meet the competition would not remove the discrimination.

"The only principle by which it is possible to enforce the whole statute is the construction adopted by the previous opinions of this Court; that is, that competition which is real and substantial and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition provided by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and noncompetitive place, and that this right is not destroyed by the mere fact that incidentally the lesser charge to

the competitive point may seemingly give preference to that point, and the greater rate to the noncompetitive point may apparently engender a discrimination against it. We say seemingly on the one hand and apparently on the other, because in the supposed cases the preference is not 'undue' or the discrimination 'unjust.' This is clearly so, when it is considered that the lesser charge upon which both the assumption of preference and discrimination is predicated is sanctioned by the statute, which causes the competition to give rise to the right to make such lesser charge."

The italics are mine.

XIV.

The Application to the Case at Bar of the Principle Established by This Court.

First: I have hereinbefore shown in Section XI, how rates from New Orleans to La Grange are made. And I hereinafter show in Sections XV to XXXI, that said rates are just and reasonable in and of themselves.

Second: I have hereinbefore shown in Section VIII, the circumstances and conditions which affect the transportation of property from New Orleans to Atlanta; and in Section IX, the circumstances and conditions which affect the transportation of property from New Orleans to La Grange, Hogansville, Newnan, Palmetto, and Fairburn. I have shown in Section X, how rates are made from New Orleans to Atlanta; and in Section XI, how rates are made from New Orleans to La Grange, Hogansville, Newnan, Palmetto, and Fairburn. I have shown in said sections that said rates to the longer distance points, viz., Atlanta, Hogansville, Newnan, Palmetto, and Fairburn, have been forced upon the carriers by competition at Atlanta; and that said competition is real and substantial, and exercises a potential influence on said rates.

Third: It is shown in the testimony that the lesser rates charged for the longer haul, from New Orleans to Atlanta, are not wholly unremunerative; *i. e.*, that they pay something more than the cost of transportation of the Atlanta traffic.

Trans., p. 107.

Fourth: The discrimination which exists against La Grange springs alone from a disparity in rates; and the preference occasioned in favor of Atlanta, Hogansville, Newnan, Palmetto, and Fairburn is not the voluntary act of the appellee carriers; but is the result of conditions wholly beyond the control of said carriers.

Fifth: Forbidding the appellees to meet the competition which exists at Atlanta would not remove the discrimination against La Grange.

Sixth: Therefore, though the lesser charge to the competitive point, Atlanta, may "seemingly" give a preference to that point, and the greater rate to the noncompetitive point, La Grange, may "apparently" engender a discrimination against it, such preference in favor of Atlanta is not "undue," and such discrimination against La Grange is not "unjust."

181 U. S., pp. 18, 19, E. T. V. & G. Ry. v. I. C. C.

XV.

The Order of the Commission Concedes in Effect that La Grange's Rates are Reasonable in and of Themselves.

In the case of E. T. V. &. G. Ry. Co. v. I. C. C., 181 U. S., p. 23, this Court said: "A decree which ordered the carrier to desist from charging a greater compensation for the lesser than for the longer haul, would be in no way responsive to the conclusion

that the rate for the lesser distance was unreasonable in and of itself. *Such a decree would in effect authorize the carrier to continue to charge at its election a rate which was in itself unreasonable to the shorter point.*"

In the case at bar, the appellees, under the order made by the Commission, may continue to charge the present rates to La Grange, provided they increase the rates from New Orleans to Atlanta, Fairburn, Palmetto, Newnan and Hogansville, to a point where they will not exceed the rates from New Orleans to La Grange.

Trans., p. 48 to 51.

To authorize the appellees to continue to charge the present La Grange rates, on condition that they secure an increase in the rates from New Orleans to Atlanta, Fairburn, Palmetto, Newnan, and Hogansville, is inconsistent with the theory that the present La Grange rates are unjust or unreasonable in and of themselves.

XVI.

The First Section of the Act to Regulate Commerce, Relates to the Reasonableness of Rates "In and Of Themselves," as Contradistinguished from Rates which Constitute Unjust Discrimination or Undue Preference.

The first section enacts that all charges "shall be reasonable and just."

24 U. S. Stat. at Large, p. 279.

Mr. Justice Brown, in delivering the opinion of the Supreme Court, in the case of I. C. C. v. B. & O. R. R., said:

"A charge may be perfectly reasonable under Section 1, and yet may create an unjust discrimination, or an unreasonable preference, under Sections 2 and 3."

145 U. S., 277, I. C. C. v. B. & O. R. R.

81 Fed. Rep., p. 804, Kinnavey v. Terminal R. Assn.

The words "reasonable and just," as used in the first section, necessarily mean rates that are reasonable and just, *in and of themselves*, as contradistinguished from the rates which are referred to in Sections 2, 3 and 4 of the act.

Section 2 was passed to provide for that class of cases where a difference in rates constitutes an unjust discrimination.

S ction 3 was passed to provide for that class of cases where a difference in rates constitutes an undue preference.

Section 4 was passed to provide for that class of cases where a difference in rates constitutes a greater charge for a shorter than for a longer haul, etc., under substantially similar circumstances and conditions.

Section 1 was passed to provide for that class of cases where the sole question involved is whether a given rate is reasonable and just, *in and of itself*, even though it does not constitute an unjust discrimination, nor an undue preference, nor a greater charge for a shorter than for a longer distance.

The phrase "just and reasonable *in and of themselves*," is used by this Court in its opinion in the case of E. T. V. & G. Ry. Co. v. I. C. C., 181 U. S. pp. 18-19.

XVII.

The Burden of Proof Under the First Section Rests Upon the Appellant.

In the case of Harding v. C. St. P. M. & O. R. Co., decided in 1887, which was one of the earliest cases decided by the Commission, the Commission held that "on a petition charging the exaction of *unreasonable* rates, *the burden of proof is on the petitioner* to sustain the charges by evidence which shows w th reasonable certainty that they are in substance true."

See 1 I. C. Rep., p. 375.

In the case of Brewer & Hanleiter v. Louisville & Nashville Railroad Company, decided in 1897, and which is one of the latest cases decided by the Commission, upon the point, the Commission reiterated the doctrine that the burden of proving that a rate is in and of itself *unreasonable* is upon the complainant.

See 7 I. C. Rep., p. 234.

Counsel for the appellant contended, in the Circuit Court, that as the facts which are necessary to enable the Court to determine the reasonableness of rates are peculiarly within the knowledge of the appellees, the burden of proving those facts ought to be placed upon them.

The contention of counsel is directly antagonistic to the decision of the Commission in the two cases just cited. Counsel ignores the fact that Section 20 of the Act to Regulate Commerce authorizes the Commission to require annual reports from all interstate railroad companies, and to require from them "specific

answers to all questions upon which the Commission may need information." Counsel also ignores the fact that interstate railroad carriers make annual reports to the Commission, showing in detail many of the facts which are proper to be considered in determining the reasonableness of rates; and if any additional facts were desired by the Commission, all that it had to do was to call for them under the twentieth section of the act, or to take the depositions of appellees' officers.

Counsel for the appellants contended, in the Circuit Court, that the appellees recognized that the burden of proof was upon them, by taking the testimony of certain expert witnesses, to the effect that, in their opinion, the rates to La Grange are just and reasonable. The appellees, knowing that the report and opinion of the Commission would be relied upon as prima facie evidence of the facts, took their testimony in the Circuit Court in advance of any testimony that was taken by the Commission; and not knowing what testimony the Commission would take in that Court upon the question as to the reasonableness of the rates to La Grange, the appellees took said expert testimony; not because they supposed that the burden of proof was upon them, under the first section, but to anticipate any proof upon the subject that the Commission might afterwards take.

The question as to what is a reasonable and just rate to be charged for the transportation of a given class of freight, for a given distance, over a given railroad, is one of great difficulty, even when considered by the most competent experts. Railroad traffic managers, and freight agents, are generally men of a high order of intelligence, who have devoted many years of their lives to the adjustment of rates; and when they have, upon mature consideration, arrived at the conclusion that a given rate is reasonable and just, it may, even upon that ground alone, be fairly

presumed, especially in the absence of proof to the contrary, that such conclusion is correct.

I respectfully submit that where a basis of rates, such as obtains from New Orleans to La Grange, has been publicly acquiesced in by shippers and consignees for a period of twelve or more years, the presumption becomes quite strong that such basis is reasonable and just.

XVIII.

The Question as to What is a Reasonable Rate is a Very Difficult One.

In the case of Ames v. U. P. Ry. Co., Mr. Justice Brewer used this language:

"But the grave question still remains, Are the rates prescribed in this act as the maximum over which the railroad companies may not go, unreasonable, and so unreasonable as to justify the Court in staying its operation? *No more difficult problem can be presented than this.* There are so many matters which enter into it, and which must be taken into consideration before a satisfactory answer can be reached."

64 Fed. Rep., 173, Ames v. U. P. Ry. Co.

In the same case, reported under the style of Smyth et al. vs. Ames (known as the "Nebraska Freight Rate Case"), this Court said: "How such compensation may be ascertained, and what are the necessary elements in such an inquiry, will always be *an embarrassing question.*"

169 U. S., p. 546.

176 U. S., p. 172, C. M. & St. P. Ry. Co. v. Tompkins.

In the case of U. S. v. Freight Association, 166 U. S., p. 331, Mr. Justice Peckham used this language:

"What is a proper standard by which to judge the fact of reasonable rates? Must the rates be so high as to enable the return *for the whole business* done to amount to a sum sufficient to afford the shareholder a fair and reasonable profit upon his investment? If so, *what is a fair and reasonable profit?* That depends sometimes upon *the risk incurred*, and the rate itself differs in different localities; which is the one to which reference is to be made as the standard? Or is the reasonableness of the profit to be limited to *a fair return upon the capital that would have been sufficient to build and equip the road, if honestly expended?* Or is still another standard to be created, and the reasonableness of the charges tried by *the cost of the carriage* of the article, and a reasonable profit allowed on that? And in such case would *contribution to a sinking fund to make repairs upon the roadbed and renewal of cars*, etc., be assumed as a proper item? Or is the reasonableness of the charge to be tested by reference to the *charges for the transportation of the same kind of property made by other roads similarly situated?* If the latter, a combination among such roads as to rates would, of course, furnish no means of answering the question. It is quite apparent, therefore, that *it is exceedingly difficult to formulate even the terms of the rule itself which should govern in the matter of determining what would be reasonable rates for transportation.*"

The italics are mine.

166 U. S., pp. 331, 332.

See also 81 Fed. Rep., pp. 551, 552, Van Patten v. C. M. & St. P. Ry. Co.

In the case of Smyth et al. v. Ames et al., Mr. Justice Harlan said:

"We hold, however, that the basis of all calculations as to reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be *the fair value* of the property being used by it for the convenience of the public. And in order to ascertain that value, *the original cost of construction*, the amount expended in *permanent improvements*, the *amount and value of its bonds and stock*, the *present, as compared with the original, cost of construction*, the probable *earning capacity* of the property under particular rates prescribed by statute, and the sum required to meet *operating expenses*, are all matters for consideration, and are given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience."

Smyth et al. v. Ames et al., 169 U. S., pp. 546, 547.

In the cases which have involved the question as to the *reasonableness* of rates, "labyrinths of tables, figures, and estimates" were presented in the testimony, discussed by counsel in their briefs, and considered by the Court with the closest scrutiny and greatest patience, as will be seen by reference to the opinions in:

64 Fed. Rep., pp. 179 to 194, Ames v. U. P. Ry. Co.

78 Fed. Rep., pp. 263-275, Southern Pacific Co. v. Board of R. R. Comrs.

154 U. S., pp. 402–413, Reagan v. Farmers' Loan & Trust Co.

169 U. S., p. 466, Smyth et al. v. Ames et al.

In the case at bar, there will not be found either in the testimony taken before the Commission, or in the testimony taken in the Circuit Court, any evidence of many of the facts sug-

gested by Justices Peckham and Harlan, as proper to be considered in determining what are reasonable rates. For instance, there was no evidence as to the *original* cost of construction, or of the "value of the bonds and stocks," etc., of any of the appellee roads.

I submit, therefore, that the evidence is wholly insufficient to enable either the Commission, or this Court, to intelligently decide that the rates to La Grange are unreasonably high in and of themselves.

XIX.

The Appellees are Entitled to a Fair Return Upon the Value of That Which They Employ for the Public Convenience.

In the case of Ames v. U. P. Ry. Co., Mr. Justice Brewer said:

"The foundation of the idea of reasonableness is justice. That which is unjust cannot be reasonable; and when the strong arm of the Legislature is laid upon property invested in railroad transportation, it must be so laid as to do justice to such investors. There can be no justice in that which works to such investors a practical destruction of their property, thus invested. It must always be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors. Railroads are not like stages or steamboats, which, if furnishing no profit at one place and under one prescribed rate of transportation, can be taken elsewhere, and put to use at other places and under other circumstances.

The railroad must stay, and, as a permanent investment, its value to its owners may not be destroyed. The protection of property implies the protection of its value."

64 Fed. Rep., p. 176, Ames v. U. P. Ry. Co.

176 U. S., p. 167, C. M. & St. P. R. R. Co. v. Tompkins.

"Justice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others."

154 U. S., 412, Reagan v. Farmers' L. & T. Co.

"What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience."

Smyth et al. v. Ames et al., 169 U. S., p. 547.

That which the appellees employ "for the public convenience" in this case is:

First: A portion of the Louisville & Nashville Railroad extending from New Orleans to Montgomery, a distance of 320 miles.

Second: A portion of the Western Railway of Alabama extending from Montgomery to West Point, a distance of 89 miles.

Third: A portion of the Atlanta & West Point Railroad extending from West Point to La Grange, a distance of 16 miles.

Trans., p. 35.

The Commission has failed to prove the value of either one of said portions of railroads; and therefore it has failed to prove that the rates charged from New Orleans to La Grange yield more than "a fair return upon the value of that which" appellees employ "for the public convenience."

XX.

The Schedule of Rates, as a Whole, Must Control.

In order to ascertain whether a railroad company has, during any given period, received any compensation for the use of its property, it is necessary to know the results of its operations *as a whole*. The result of its operations as to any particular article, as coal, pig iron, etc., is of no value; because, though it may have carried those articles at or even under cost, the other articles carried by it may have yielded more than a reasonable profit upon the entire investment.

And so, though it may have carried some articles at rates which, looked at by themselves, would appear to be excessive, yet when considered in connection with the rates charged on the entire volume of traffic carried by it, will be found to be insufficient to yield a fair return upon the value of the road.

In the case of the Chicago & N. W. Ry. v. Dey, Mr. Justice Brewer said:

"Coming now to the question of the schedule as presented, I remark that the schedule, *as a whole*, must control, and its validity or invalidity *does not depend upon the sufficiency or insufficiency of the rates for any few particular subjects of transportation.*"

35 Fed. Rep., p. 881, C. & N. W. Ry. Co. v. Dey.

In the case of Chicago, etc., Ry. Co. v. Minnesota, Mr. Justice Miller, in a concurring opinion, said:

"That the proper, if not the only, mode of judicial relief against the tariff of rates established by the Legislature or by its Commission, is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fares as excessive, or establishing its right to collect the rate as being within the limit of a just compensation for the service rendered."

"That until this is done, *it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the question which ought to be settled in this general and conclusive method.*"

134 U. S., p. 460, Chicago, etc., Ry. Co. v. Minnesota.

In its Eleventh Annual Report, the Commission states that the classifications now in use in this country embrace from 5,000 to 7,000 items.

11 Ann. Rep., I. C. C. (1897), p. 66.

How would it be possible for any tribunal to ascertain what would be a reasonable rate upon one of those items; as, for instance, coal, or pig iron, without taking into consideration any of the remaining five or seven thousand articles?

In the case at bar a single individual, Fuller E. Calloway, seeks "to raise a contest in the courts over the question" as to what are reasonable rates upon the numbered and lettered classes of freight from New Orleans to La Grange.

He does not seek to investigate the reasonableness of the freight rates charged by appellees from any station except New Orleans, nor to any station except La Grange.

The Commission finds and reports that, for the year ending June 30, 1895, the appellees carried from New Orleans to La Grange only 100 tons of freight; which freight was carried from West Point to La Grange by the Atlanta & West Point Railroad.

Trans., p. 34.

During the year ending June 30, 1895, the Atlanta & West Point Railroad carried between its various stations, 214,905 tons of freight.

Trans., pp. 96, 156, 157.

How is it possible for either the Commission or the Court to ascertain what are reasonable and just rates upon the 100 tons of freight carried from New Orleans to La Grange, without taking into consideration the rates that the Atlanta & West Point Railroad was compelled to accept upon the remainder of the 214,905 tons carried by it during the same year?

This Court is asked to single out the traffic which originates at New Orleans alone, and which is destined to La Grange alone, and to decide what are reasonable and just rates on that comparatively insignificant amount of traffic; without regard to what may have been the result of the operations of either of the appellee companies under their schedules, "taken as a whole;" and even without regard to what may have been the result of the operations of those portions of their respective roads which compose the line from New Orleans to La Grange, under the schedules of that line, "taken as a whole."

XXI.

The Rates from New Orleans to La Grange are Lower than Can be Obtained by Any Means of Land Transportation, Other than Rail Transportation.

The distance from New Orleans to La Grange via the appellees' line is 425 miles.

Trans., p. 35.

The appellees' rates for transporting freight from New Orleans to La Grange, a distance of 425 miles, are the following in cents per 100 pounds, except as to class F, which is in cents per barrel of 200 pounds:

Classes	1	2	3	4	5	6	A	B	C	D	E	H	F
	143	124	109	93	74	59	41	48	33.5	29	66	74	50

It will be noticed that even if the tonnage carried from New Orleans to La Grange were equally divided between the thirteen classes, the average rate would be less than 73.3 cents per 100 pounds.

It appears, however, that for the year ending June 30, 1895, the total amount of freight carried from New Orleans to La Grange was only 100 tons; that none of said freight belonged to classes 1, 2, or 3, which classes carry the three highest rates; that only seven tons belonged to class 4; and only six tons belonged to class 6; and that the remainder of the tonnage was carried at "commodity rates." Of the total 100 tons carried

from New Orleans to La Grange, 17 tons consisted of molasses; 13 tons consisted of sugar; and three tons consisted of rice.

Trans., pp. 90, 91, 142.

The rate from New Orleans to La Grange on sugar is 38 cents; on molasses, 37 cents; and on rice 34½ cents per hundred pounds.

Trans., p. 282.

It will be noticed that none of the freight carried from New Orleans to La Grange paid more than the fourth-class rate, which is 93 cents per hundred pounds; and that 33-100 of said freight (consisting of molasses, sugar, and rice) was carried for less than 38 cents per hundred pounds.

But assume, for the sake of argument, that the tonnage carried from New Orleans to La Grange is equally divided between the thirteen classes, and that the average rate is therefore something less than 73.3 cents, I insist, with the utmost confidence, that such a rate is not only reasonable and just for transporting 100 pounds of freight a distance of 425 miles, but that it is an exceedingly low rate. It is certainly a lower rate than can be obtained by any means of transportation, except rail.

Trans., p. 385.

I feel quite sure that history will not record an instance where 100 pounds of freight has been transported a distance of 425 miles for an average rate of less than 73.3 cents by any means of land transportation, other than rail.

How can it be affirmed with any degree of fairness that a rail rate is unreasonably high, when it is shown to be less than ever has been obtained by any other means of land transportation?

Freight is generally transported by railroads a given distance

in less time, and in better condition, than by any other means of transportation; and why should railroads be required to render this superior service at less rates than are charged by any other means of land conveyance?

It is contended by counsel for appellant that it is unfair to compare railroad rates with wagon rates, for the following, among other reasons:

1. Where a wagon or cart carries one ton of freight, a railroad carries thousands.

2. Where a wagon or cart carries freight one mile, a railroad carries it hundreds, or thousands, of miles.

3. Wagons and carts have no monopoly of transportation over a particular roadway.

As to the first and second reasons, it is true that a railroad train, or even a single freight car, can carry a much larger quantity of freight than can be carried in a wagon or cart. It is also true that railroads, by joining in through rates and through routes, can carry freight for much greater distances than it is usually carried in wagons or carts. But the fact that railroads can carry larger quantities of freight, for greater distances, than can be done by wagon or cart, simply demonstrates the superior service which railroads can and do render to the public. It furnishes no reason for holding that because they can, and do, render a superior service, they shall render it for a less rate than is charged for a vastly inferior service.

If it be said that as railroads can carry larger quantities of freight, and for greater distances within a given time, it is evidence that they can afford to carry at a less rate per ton per mile than the rates charged by wagon, the answer is two-fold:

First: The financial result of the operations of the railroads in the United States since the inauguration of the railroad system, is one of almost universal bankruptcy. It is extremely doubtful whether 500 miles of connected railway can be found in the United States some part of which has not, at some time or other, gone through bankruptcy.

No one can affirm with any degree of confidence what is the relative cost of railroad transportation, as compared with the cost of wagon transportation.

Second: But whether railroads can afford to do so, or not, it is conceded that they do carry not only at very much less rates per ton per mile, than rates charged by wagon; but at rates so much less than wagon rates as to have driven wagons out of competition in all cases except where the transportation is for relatively short distances.

As to the suggestion that wagons and carts have no monopoly of transportation over a particular roadway, it is sufficient to say that, on the other hand, they are entirely relieved of the expense of constructing roadways, and contribute but little toward their maintenance.

As to the suggestion that railroads have a monopoly of transportation over their roadways, it is sufficient to say that they are subjected by law to severe government supervision and control, with a view to preventing them from using their monopoly to the detriment of the public. They are strictly prohibited from making any unjust discrimination, or giving any undue preference, or charging any unreasonable compensation.

The question, however, as to what is a reasonable compensation for a railroad to charge in a given case has been left by the

law to the final determination of the courts; and in considering that question, there is nothing in the law to prevent the courts from comparing rail rates with rates charged by wagon, by pack mules, or by any other means of land transportation.

XXII.

The Appellees' Rates from New Orleans to La Grange are as Low as are Charged by Any Other Rail Line Operating Between Those Points.

It is by no means necessary for La Grange merchants to use the appellees' line in shipping from New Orleans to La Grange.

The Louisville & Nashville Railroad, the New Orleans & Northeastern Railroad, and the Illinois Central Railroad are initial carriers at New Orleans. They and their connections form some ten or twelve different routes which compete for traffic moving between New Orleans and Atlanta. Merchants at La Grange can elect between the Louisville & Nashville Railroad and its connections; the New Orleans & Northeastern Railroad and its connections; and the Illinois Central Railroad and its connections; and the rates charged by the appellees' line from New Orleans to La Grange are as low as those charged by any of the competing routes between the same points.

XXIII.

The Appellees' Rates from New Orleans to La Grange are as Low as the Rates Charged by Railroads from Memphis to La Grange.

Mr. Biles testifies that the appellees' rates from New Orleans to La Grange are practically identical with the rates from Memphis, from which point the distance is practically the same.

Trans., p. 391.

XXIV.

The Appellees' Rates from New Orleans to La Grange are, as a Rule, Four Cents Per Hundred Pounds Less than Rates Charged by Railroads from Louisville and Other Ohio River Points to La Grange.

Mr. Biles testifies that the appellees' rates from New Orleans to La Grange are, as a rule, 4 cents per hundred pounds less than the rates from Louisville and other Ohio River points (Trans., p. 391); and the Commission finds and reports that the normal, long established relation of rates to Atlanta gives a first-class rate from New Orleans to Atlanta, which is 4 cents per hundred pounds less than the rates from Cincinnati and Louisville.

Trans., pp. 391, 33.

The local rates from Atlanta to La Grange are the same whether traffic destined for La Grange comes to Atlanta from New Orleans, or from Cincinnati, or Louisville.

XXV.

The Appellees' Rates from New Orleans to La Grange are Lower than Rates Charged by Railroads from Baltimore to La Grange.

The Commission finds and reports that the normal, long established, relation of rates to Atlanta, gives a first-class rate from New Orleans to Atlanta, which is 16 cents per 100 pounds lower than the all-rail rate from Baltimore to Atlanta; and 4 cents lower than the sea and rail rate from Baltimore to Atlanta.

Trans, p. 32.

The local rates from Atlanta to La Grange are the same whether traffic destined for La Grange comes to Atlanta from New Orleans, or from Baltimore.

XXVI.

The Appellees' Through Rates from New Orleans to La Grange are Lower than Rates Charged by Railroads from New York, Philadelphia, or Boston to La Grange.

The Commission finds and reports that the normal, long established, relation of rates to Atlanta, gives a first class rate from New Orleans to Atlanta, which is 23 cents per 100 pounds lower than the all-rail rate from New York, Philadelphia, and Boston to Atlanta; and 11 cents lower than the sea and rail rate from New York, Philadelphia, and Boston to Atlanta.

Trans., p. 32.

The local rates from Atlanta to La Grange are the same whether traffic destined for La Grange comes to Atlanta from New Orleans, or from New York, Philadelphia, or Boston.

XXVII.

The Appellees' Rates from New Orleans to La Grange are, as a Rule, Materially Lower than the Sum of the Locals Between Those Points.

The local rates from New Orleans to Mobile; and the local rates from Mobile to Montgomery are stated by Mr. Knott.

Trans., p. 117.

The local rates from Montgomery to West Point, and from West Point to La Grange, are stated by Mr. Lutz.

Trans., pp. 104, 105, 174, 176.

The rates charged by appellees from New Orleans to La Grange are stated by the Commission in its report and opinion.

Trans., p. 35.

The following table shows the sum of the local rates from New Orleans to La Grange, compared with the through rates charged by the appellees from New Orleans to La Grange, and the difference in favor of appellees' through rates:

Classes	1	2	3	4	5	6	A	B	C	D	E	H	F
New Orleans to Mobile	50	37	25	18	15	15	12	15	12.5	10	15	18	25
Mobile to Montgomery	50	40	30	24	20	20	15	20	14	12	24	19	20
Montgomery to West Point	55	47	42	32	26	21	21	23	21	17	29	32	40
West Point to La Grange	20	18	17	13	12	10	10	10	6	5.5	12	13	12.5
Sum of Locals, New Orleans to La Grange	175	142	114	87	73	66	58	68	53.5	44.5	80	82	97.5
Appellees' through rates, New Orleans to La Grange	143	124	109	93	74	59	41	48	33.5	29	66	74	59
Difference in fav'r of Appellees' through rates	32	18	5	-6	-1	7	17	20	20	15.5	14	8	38.5

It will be seen that with the exception of the rates on classes 4 and 5, the appellees' through rates from New Orleans to La Grange are materially lower than the sum of the locals.

There is no legal or moral reason why the Louisville & Nashville Railroad should carry freight for a La Grange merchant from New Orleans to Mobile, for any less rate than it charges a New Orleans merchant for carrying the same kind and quality of freight between the same points. Neither is there any legal or moral reason why the Louisville & Nashville Railroad should carry freight for a La Grange merchant from Mobile to Montgomery, for any less rate than it charges a Mobile merchant for carrying the same kind and quality of freight between the same points. Neither is there any legal or moral reason why the Western Railway of Alabama should carry freight for a La Grange merchant from Montgomery to West Point, for any less rate than it charges a Montgomery merchant for carrying the same kind and quality of freight between the same points. Neither is there any legal or moral reason why the Atlanta & West Point Railroad should carry freight for a La Grange merchant from West Point to La Grange, for any less rate than it charges a West Point merchant for carrying the same kind and quality of freight between the same points. Neither is there any legal or moral reason why the appellees should carry freight for a La Grange merchant from New Orleans to La Grange, for any less than the sum of their local rates; and the only reason why they do so is that competition at Atlanta compels it.

XXVIII.

The Appellees' Through Rates from New Orleans to La Grange are, as a Rule, Materially Lower than the Sum of the Competitive Rates from New Orleans to Montgomery, Added to Rates from Montgomery to West Point Approved by the Alabama Railroad Commission, and Rates from West Point to La Grange Approved by the Georgia Railroad Commission.

The all-rail rates from New Orleans to Montgomery are stated by the Commission in its report and opinion.

Trans., p. 35.

Said rates are made under the stress of competition with boats plying from New Orleans to Mobile, and boats plying the Alabama River from Mobile to Montgomery; said river boats ply from six to ten months during the year, and run sometimes as frequently as three times a week. During the boating season, it is of almost daily occurrence to have freight shipped from New Orleans to Mobile, paying the local rail rates to Mobile, and then paying the local boat rates from Mobile to Montgomery, and thereby getting a somewhat lower rate than the direct all-rail rate. It is entirely practicable for Montgomery merchants to secure their freight at the present rates, or even at lower rates, if an attempt were made to advance the rates from New Orleans to Montgomery by the all-rail lines.

Trans., p. 126.

The rates from Montgomery to West Point are stated by Mr.

Lutz, who says that they have been approved by the Alabama Railroad Commission.

Trans., p. 104.

The rates from West Point to La Grange are stated by Mr. Lutz in Exhibit No. 19 to his deposition before the Commission; and he says that they have been approved by the Georgia Railroad Commission.

Trans., pp. 105, 174, 176.

The appellees' through rates from New Orleans to La Grange are stated by the Commission.

Trans., p. 35.

The following table shows the sum of the competitive rates from New Orleans to Montgomery, added to rates from Montgomery to West Point, approved by the Alabama Railroad Commission, and rates from West Point to La Grange approved by the Georgia Railroad Commission; it also shows the through rates charged by appellees from New Orleans to La Grange and the difference in favor of appellees' through rates.

Classes	1	2	3	4	5	6	A	B	C	D	E	H	F
Rates, New Orleans to Montgomery	88	79	68	55	47	36	24	27	20	16	44	29	32
Rates, Montgomery to West Point	55	47	42	32	26	21	21	23	21	17	29	32	40
Rates, West Point to La Grange	20	18	17	13	12	10	10	10	6	5.5	12	13	12.5
Total	164	144	127	100	85	67	55	60	47	38.5	85	74	84.5
Appellees' through rates from New Orleans to La Grange	143	124	109	93	74	59	41	48	33.5	29	66	74	59
Difference in favor of Appellees' through rates	21	20	18	7	11	8	14	12	13.5	9.5	19	00	25.5

It will be seen that on every class, the appellees' through rates from New Orleans to La Grange are materially lower than said combination would make.

XXIX.

The Appellees' Rates from New Orleans to La Grange Compare Favorably with the Figures which the Georgia Railroad Commission Would Authorize from a Point Within that State Equidistant with New Orleans from La Grange.

Mr. Biles, speaking of the appellees' rates from New Orleans to La Grange, says:

"They compare favorably with the figures which the Georgia Railroad Commission would authorize from a point within the State equidistant. Using the tariffs authorized by the Georgia Railroad Commission for the railroads under class 4, as an average of all, and applying the 90 per cent basis in effect where traffic moves over two distinct lines of railroad, would result in the following comparative figures:

Classes	1	2	3	4	5	6	A	B	C	D	E	H	F
Appellees' Rates from New Orleans	143	124	109	93	74	59	41	48	35.5	29	66	74	59
Rates according to Georgia Commission scale	148	131	108	90	71	60	60	52	31	28	71	90	60

The traffic in question from New Orleans passes over three lines of railroad, and the comparison with the Georgia scale made on that basis would show the rates from New Orleans in a still more favorable light."

Trans., p. 391.

XXX.

The Appellees' Rates from New Orleans to La Grange Have Been Sufficiently Low to Encourage and Promote the Mercantile Business at La Grange.

Mr. Culp testifies that "business has been transported under these rates in the past and with evident profit to the merchants, since the mercantile business of La Grange, covered by the classes named, is increasing."

Trans., p. 385.

As shown by the United States Census, the population of La Grange in 1870 was 2,053; in 1880, 2,295; in 1890, 3,090; and when the court testimony was taken in this case, the population of La Grange was about 5,000.

Trans., pp. 285, 292, 297, 302, 308, 313, 318, 328, 334.

La Grange has from thirty-five to forty stores, two cotton mills, planing and grist mills, waterworks and electric light plant, two female colleges, a foundry, a carriage factory, a creamery, and a number of smaller industries.

Trans., pp. 285, 292, 297, 302, 308, 313, 318, 328, 334.

It may be that Atlanta, Fairburn, Palmetto, Newnan, and Hogansville have lower rates than La Grange; it may be that such lower rates constitute a preference in favor of Atlanta, Fairburn, Palmetto, Newnan, and Hogansville as against La Grange; but I submit with confidence that no set of rates can be condemned as unreasonable or unjust, *in and of themselves*, where the proof shows, as it does in this case, that traffic has moved under those rates, and at such a profit to the shipper or consignee, as to steadily and materially promote the commercial prosperity of the city where such rates are charged.

XXXI.

The Appellees' Rates from New Orleans to La Grange Are, in the Opinion of Experts, Reasonable and Just.

J. M. Culp, Traffic Manager of the Southern Railway; S. R. Knott, Vice President of the Louisville & Nashville Railroad; G. P. Biles, General Freight Agent of the Cincinnati, New Orleans & Texas Pacific Railway; R. E. Lutz, Traffic Manager of the Atlanta & West Point Railroad and the Western Railway of Alabama; P. J. McGovern, Chairman of the Southern Classification Committee; W. K. Vandiver, Chief Rate Clerk of the Southeastern Freight Association; and T. S. Davant, General Freight Agent of the Norfolk & Western Railway, all of whom are fully competent to speak as experts, express the opinion that the appellees' rates from New Orleans to La Grange are just and reasonable. *And no witness expresses an opinion to the contrary.*

Trans., pp. 385, 380, 390, 104, 116, 117, 370, 376.

Said witnesses state the following as the reasons why they are of opinion that said rates are reasonable and just:

First: They are made up of two sets of rates, namely, the rates from New Orleans to Atlanta, which are lower than they would be but for competition of controlling force at Atlanta; and the low rates from Atlanta to La Grange made by the Railroad Commission of the State of Georgia.

Trans., pp. 380, 381, 370.

Second: They compare favorably with rates for similar distances and to points similarly located.

Trans., p. 376.

Third: They are in line with the rates to other points in the vicinity of La Grange, similarly situated, and with which La Grange competes.

Trans., p. 385.

Fourth: They are in line with the rates from New Orleans to similarly located points.

Trans., p. 381.

Fifth: They are relatively adjusted with respect to rates from Memphis, St. Louis, Cincinnati, and Louisville.

Trans., pp. 385, 376.

Sixth: They are made with due regard to the rates from South Atlantic ports, and Eastern and Western points.

Trans., p. 381.

Seventh: They are practically identical with the rates from Memphis, from which point the distance is practically the same (418 miles).

Trans., p. 391.

Eighth: They are, as a rule, 4 cents per 100 pounds less than the rates from Louisville and other Ohio River points.

Trans., p. 391.

Ninth: They compare favorably with the figures which the Georgia Railroad Commission would authorize from a point within the State equidistant (with New Orleans from La Grange).

Trans., p. 391.

Tenth: Considering the amount of traffic moving from New Orleans to La Grange, the appellees' rates constitute no more than a reasonable compensation for the service performed in transporting traffic 425 miles.

Trans., pp. 390, 391.

Eleventh: They do not yield the carriers excessive revenue for the service performed.

Trans., p. 376.

Twelfth: Business has been transported under those rates in the past, and with evident profit to the merchants; since the mercantile business of La Grange covered by the classes is increasing.

Trans., p. 385.

Thirteenth: They are lower than rates at which the property could be transported by any other known means of rail conveyance between New Orleans and La Grange.

Trans., p. 385.

In the cases of the Interstate Commerce Commission v. Western & Atlantic Railroad Company et al., decided by the Fifth Circuit Court of Appeals, on March 21, 1899, cases which involved precisely the same questions as are involved in the case at bar; that Court in speaking of the reasonableness of the rates in controversy in those cases, said:

"The most careful consideration of the testimony brought up in the records in these cases does not disclose any evidence that was offered by the appellant (the Commission) in the Circuit Court tending to show that the rates, separately considered, to the respective points, are not reasonable and just; and the replies that were drawn by a most skillful cross-examination from the witnesses, called by the appellees (the railroad companies), do not show or tend to show, that the rates to the respective points are not reasonable and just. On the contrary, the great volume of testimony, given by these witnesses (who show full competency to testify), is directly and clearly to the effect that the rates are reasonable and just. One witness gives a reason for this opinion (for the subject is hardly susceptible of better proof than

the opinion of experts) that the rates are fixed upon the lowest obtainable combination of the rates to competitive points, with the local rates therefrom to the noncompetitive points, so that the traffic to the noncompetitive stations has the benefit of whatever reductions competition has effected in the adjustment of rates to the competitive points, and that the rates are lower than prevail in some of the other sections of the country, and lower than can be obtained by any other means of transportation, and are not higher than are charged from other points of distribution to stations on other railroads under similar circumstances and conditions. And another witness says the rates are 'just and reasonable, in that they are not unjustly or unreasonably high. They are lower than the rates at which the property can be transported by any other means of transportation. They have not prevented the shipment of freight. Traffic has been shipped with profit under these rates. They are just, relatively, to rates to other points in the State of Georgia similarly situated. These rates are based upon rates to Chattanooga, which are controlled and fixed by competition, and added to the rates from Chattanooga to the several stations, which are the same for the same distance as the rates fixed by the Railroad Commission of Georgia.' These reasons do not convince the counsel for appellant (the Commission), but appear to us to have weight."

93 Fed. Rep., pp. 88, 89, I. C. C. v. W. & A. R. R. Co.

XXXII.

Appellant's Comparison of Appellees' Rates with the "Standard Freight Tariff" Rates of the Georgia Railroad Commission for an Equal Distance.

Under a stipulation of counsel made in this case, the appellant filed in the Circuit Court, as evidence, a copy of the "Standard Freight Tariff" as established by the Railroad Commission

of Georgia, as set forth on page 50 of the Twenty-sixth Annual Report of that Commission for the year from October 15, 1897, to October 15, 1898. Said "Standard Freight Tariff" shows the rates fixed by the Georgia Railroad Commission upon classes 1, 2, 3, 4, 5, 6, A, B, C, D, E, F, G and H, for distances from 5 miles to 460 miles, inclusive.

It is agreed in said stipulation that the Atlanta & West Point Railroad is allowed to add 10 per cent to said rates on all the classes named in said "Standard Freight Tariff," except classes C, D and F; and that class C embraces rice.

Trans., pp. 245, 246.

The distance from New Orleans to La Grange, via appellees' line, is 425 miles. The Atlanta & West Point Railroad extends from West Point, via La Grange, to Atlanta, and the distance from West Point to La Grange is 16 miles.

Trans., p. 35.

Under a stipulation of counsel made in this case on June 16, 1899, it is agreed that the following portion of Freight Rule No. 30 is a correct extract from pages 34 and 38 of said 26th Report of the Railroad Commission of Georgia, viz.:

"On shipments of freight not governed by Rule No. 1, originating and terminating in this State, which shall pass over the whole or portions of two or more roads, not under the same control, the maximum rates charged on such shipments shall not be greater than the sum of the local rates on such freight less ten (10) per cent, for the distance hauled over each road. The total rate thus ascertained on such freight from the point of shipment to the point of destination shall be divided in such proportions between the roads over which such freights pass so as to give to each road interested in the shipment its local rate less ten (10) per cent for the distance such shipment is hauled."

Trans., pp. 249, 250.

Appellant's counsel, in the Circuit Court, submitted a table which showed the rates allowed by said "Standard Freight Tariff" for a distance of 425 miles (it being the distance from New Orleans to La Grange), to which he added 10 per cent for carriage by the Atlanta & West Point Railroad; and showed that the sum of the rates thus arrived at is lower than the rates charged by appellees from New Orleans to La Grange.

By reference to said "Standard Freight Tariff" it will be seen that it is what is known as a "distance tariff." The rates increase with the distance, but not in proportion to the distance. In other words, while the *rate* increases, *the rate per ton per mile* decreases with the distance.

To illustrate: The rate fixed by said "Standard Freight Tariff" on first-class freight for five miles is 12 cents per hundred pounds, which is equal to 48 cents per ton per mile; while the rate fixed by it for 460 miles is 94 cents per hundred pounds, which is equal to only 4 cents per ton per mile. The result is that the rates fixed by said "Standard Freight Tariff" for four roads of 100 miles each, are, in the aggregate, materially higher than the rate fixed by said tariff for one road of 400 miles.

Referring again to the rates on first class, as fixed by said "Standard Freight Tariff," and assuming that there are four roads each 100 miles long, the sum of their locals would be as follows:

Road No. 1 (100 miles long) first-class rate.....	45 cents
Road No. 2 (100 miles long) first-class rate.....	45 cents
Road No. 3 (100 miles long) first-class rate.....	45 cents
Road No. 4 (100 miles long) first-class rate.....	45 cents
Total for four roads.....	$1 80
While for a distance of 400 miles owned by one company, the first-class rate fixed by said tariff is, for that distance.....	88 cents

Under Freight Rule 30 of the Georgia Railroad Commission, a portion of which has been quoted above, four railroads of 100 miles each would be entitled to charge the sum of their locals, with a deduction of only 10 per cent. Applying said 10 per cent deduction to the illustration set forth above, it will be found that the first-class through rate allowed by said "Standard Freight Tariff" to four roads of 100 miles each would be $1.62, while the rate for one road of 400 miles would be only 88 cents.

The roads which now constitute appellees' line from New Orleans to La Grange were originally owned and operated by four distinct companies:

1. A road from New Orleans to Mobile, 140 miles long.
2. A road from Mobile to Montgomery, 180 miles long.
3. A road from Montgomery to West Point, 89 miles long.
4. A road from West Point to La Grange, 16 miles long.

Trans., pp. 31, 35, 116, 117.

Applying said "Standard Freight Tariff" for those distances, it will be found that the rates would be as follows:

	1	2	3	4	5	6	A	B	C	D	E	H	F
For a distance of 140 miles	57	48	43	34	27	22	22	22	13	13	27	34	26
For a distance of 180 miles	66	56	48	38	31	26	26	26	15	14	31	38	31
For a distance of 89 miles	42	38	33	29	22	17	17	17	11	10	22	29	21.5
For a distance of 16 miles	18	16	15	12	11	9	9	9	6	5.5	11	12	12.5
Total for 425 miles	183	158	139	113	91	74	74	74	45	42.5	91	113	91
Deduct 10 per cent as required by Rule 30	18	16	14	11	9	7	7	7	4.5	4	9	11	9
Net rates allowed by said tariff	165	142	125	102	82	67	67	67	40.5	38.5	82	102	82
Appellees' through rates from New Orleans to La Grange	143	124	109	93	74	59	41	48	33.5	29	66	74	59
Difference in favor of Appellees' through rates	22	18	16	9	8	8	26	19	7	9.5	16	28	23

It will be seen, therefore, that in applying said "Standard Freight Tariff" it is not fair to treat the several roads which

constitute the line from New Orleans to Montgomery, as though they were owned and operated by one company.

Again, the Georgia Railroad Commission gets its power to make rates from an act of the General Assembly of that State approved October 14, 1879, and its amendments. A copy of said act is filed as an Exhibit to R. E. Lutz's deposition.

Trans., p. 177, *et seq.*

By reference to said act, it will be seen that the rate-making powers of said Commission are, for all practical purposes, absolute and despotic so long as the rates are not confiscatory in their character. It will be seen that the Commission was appointed at the instance of the shipping public; and, therefore, any rates fixed by that Commission may fairly be assumed to be not only reasonably low from the shippers' standpoint, but *un*reasonably low from the carriers' standpoint. They cannot, therefore, be fairly used as evidence of reasonably high rates to be charged by carriers in the States of Alabama, Mississippi, and Louisiana; those being the three States in which all of the line in controversy is situated, except the 16 miles which lies between West Point and La Grange.

XXXIII.

Appellant's Comparison of Appellees' Rates from New Orleans to La Grange with the Local Distance Tariff of the Illinois Central Railroad.

Under a stipulation of counsel made in this case at the instance of appellant, it is stipulated "that under the local distance tariff of the Illinois Central Railroad Company (Southern lines), I. C. C. No. B, 316, issued May 18, 1897, and effective June 1, 1897," the class rates for the distance of 425 miles are, except

on classes A, C, D and F, lower than appellees' rates, for the same distance, from New Orleans to La Grange.

It appears from said stipulation that said tariff of the Illinois Central Railroad is a "local distance tariff;" and it is doubtless constructed upon a mileage basis somewhat similar to that used in constructing the "Standard Freight Tariff" of the Georgia Railroad Commission.

Trans., p. 247.

In Section XXXII, I have shown that in what is known as a "distance tariff," the rates increase with the distance, but not in proportion to the distance, and the result is that the rates fixed by a "distance tariff" for four roads of 100 miles each are in the aggregate, materially higher than the rate fixed by such tariff for one road of 400 miles.

Under Section 16 of the Act to Regulate Commerce, the Circuit Court has power "if it think fit to direct and prosecute in such mode and by such persons as it may appoint all such inquiries as the Court may think needful to enable it to form a just judgment in the matter of said petition."

K. & I. Bridge Co. v. L. & N. R. R. Co., 37 Fed Rep., p. 567.

If this Court should be of opinion that a comparison of appellees' rates with said tariff I. C. C. No. B, 316, "for a distance of 425 miles" is of any value, the appellees now ask the Court to remand the case with directions for the Circuit Court to call upon the appellants to file a complete copy of said tariff for all distances, or to file a statement showing the rates charged in said tariff upon the several classes for distances of 16, 89, 105, 140, 180 and 320 miles, respectively. If said tariff or statement be filed, appellees have reason to believe that it will be found that said rates will be shown in said tariff to be as follows:

	Miles	Classes												
		1	2	3	4	5	6	A	B	C	D	E	H	F
For the distance from New Orleans to Mobile	140	68	54	44	37	32	28	27	29	23	19	32	44	43
For the distance from Mobile to Montgomery	180	75	60	50	41	35	31	30	32	26	22	35	50	49
For the distance from Montgomery to West Point	89	58	46	38	32	27	24	22	24	20	17	27	38	38
For the distance from West Point to La Grange	16	33	26	22	18	16	14	13	14	13	10	16	22	23
Total for	425	234	186	154	128	110	97	92	99	82	68	110	154	153
For the distance from New Orleans to Montgomery	320	85	68	56	47	40	35	35	37	29	25	40	56	55
For the distance from Montgomery to La Grange	105	62	50	41	34	29	26	24	26	21	18	29	41	39
Total for	425	147	118	97	81	69	61	59	63	50	43	69	97	94
Appellees' through rates from New Orleans to La Grange	425	148	124	109	93	74	59	41	48	33.5	29	66	74	59

The comparison which the appellant seeks to make between appellees' rates and said "local distance tariff" of the Illinois Central Railroad assumes that the line from New Orleans to La Grange (a distance of 425 miles) is operated by one company, whereas, it was originally operated by four independent companies, and is now operated by two independent managements.

If the Illinois Central Railroad were to receive the entire revenue for a haul of 425 miles, it might be willing to accept the rates mentioned in said stipulation; and yet, if the haul were for only 320 miles (the distance from New Orleans to Montgomery), it would demand a much higher rate per ton per mile; and if the haul were for only 105 miles (the distance from Montgomery to La Grange), it would demand a *very* much higher rate per ton per mile.

There is nothing in the record to show what is meant by the "Southern lines" of the Illinois Central Railroad. Nor is there anything in the record to show that the circumstances and conditions attending the transportation of traffic over those lines are substantially similar to those attending the transportation

of traffic over the appellees' line from New Orleans to La Grange.

The "Southern lines" of the Illinois Central Railroad are closely paralleled all the way from Cairo to New Orleans by the Mississippi River, and even its "local distance" rates are dominated by the water rates on the Mississippi River.

New Orleans Cotton Exchange v. Illinois Central R. Co., 2 I. C. Rep., 779, 791.

In the case of Business Men's Association v. Chicago, St. Paul, Minneapolis & Omaha Railroad Company, the Commission said: In the "cases of Evans & Reed v. Oregon Railway & Navigation Company, I Inters. Com. Com. Rep., 536, 1 Inters. Com. Rep., 641, we had occasion to consider the subject of comparing the rates established on railroads in one portion of the country with those in another, operated under substantially different circumstances and conditions, and we there held that such comparisons are not fair tests. That is equally true of the present case of comparisons between rates made in that portion of the country so near as to be dominated by the water rates on Lake Superior, and on the other hand, rates in the far interior made under substantially different circumstances and conditions."

2 I. C. Rep., p. 47, Business Men's Asso. v. C. St. P. M. & O. Ry. Co.

In case of Freight Bureau v. C. N. O. & T. P. R. Co., the Commission said:

"A comparison of rates on one road or line with those on another for the purpose of determining the reasonableness of either, is, as before stated, valuable only to the extent of the similarity of circumstances and conditions attending the transportation in

the two cases and relative equality in rates is only necessary in the *degree* of such similarity."

4 I. C. Rep., p. 611, Freight Bureau v. C. N. O. & T. P. R. Co.

The burden of proof was upon the appellant to show that the circumstances and conditions attending the transportation of traffic over the "Southern lines" of the Illinois Central Railroad are substantially similar to those attending the transportation of traffic over the appellees' line from New Orleans to La Grange; and as appellant introduced no testimony upon this point, the "local distance tariff" rate of those lines for the distance of 425 miles is of no value as a standard of comparison in this case.

XXXIV.

Appellant's Comparison of Appellees' Rates from New Orleans to La Grange with Certain Tariffs of the Southern Railway.

Under the stipulation of counsel referred to in the last section, it is stipulated "that under local freight tariff No. 1047 W. S., of the Southern Railway (western system), I. C. C. 233, effective February 18, 1895, applying on business within the States of Tennessee and Alabama, and on interstate traffic between stations in the States of Tennessee, Georgia, Alabama, and Mississippi," the class rates for a distance "of over 300 miles" are, except on classes A, C, D and F, lower than appellees' rates for 425 miles from New Orleans to La Grange.

As said tariff No. 1047 W. S. is styled a "local freight tariff," it is constructed upon a mileage basis somewhat similar to that used in constructing the "Standard Freight Tariff" of the Georgia Railroad Commission.

Trans., p. 248.

If the Court should be of opinion that a comparison of appellees' rates with said tariff 1047 W. S., "for a distance of over 300 miles" is of any value, the appellees now ask the Court to remand the case with directions to the Circuit Court to call upon the appellant to file a complete copy of said tariff for all distances, or to file a statement showing the rates charged in said tariff upon the several classes for distances of 16, 89, 105, 140, 180 and 320 miles, respectively.

If said tariff or statement be filed, appellees have reason to believe that it will be found that said rates will be shown in said tariff to be as follows :

	Miles.	Classes.												
		1	2	3	4	5	6	A	B	C	D	E	H	F
For the distance from New Orleans to Mobile	140	68	58	52	47	43	31	27	29	25	22	43	47	50
For the distance from Mobile to Montgomery	180	76	65	58	51	47	35	31	33	28	25	47	51	56
For the distance from Montgomery to West Point	80	57	50	45	41	38	26	23	23	21	18	38	41	42
For the distance from West Point to La Grange	16	28	24	22	20	17	13	13	14	13	10	18	20	26
Total for	425	229	197	177	159	145	105	94	99	87	75	146	159	174
For the distance from New Orleans to Montgomery	320	103	88	77	55	52	42	43	41	35	32	52	55	70
For the distance from Montgomery to La Grange	105	61	54	49	44	40	28	24	25	22	19	40	44	44
Total for	425	164	142	126	99	92	70	67	69	57	51	92	99	114
Appellees' thro' rates from New Orleans to La Grange	425	143	124	109	93	74	59	41	48	33.5	29	66	74	59

The comparison which appellant seeks to make between appellees' rates and said local freight tariff No. 1047 W. S. assumes that the line from New Orleans to La Grange is operated by one company; whereas it was originally owned and operated by four distinct companies; and it is now operated by two independent managements.

There is nothing in the record to show what is meant by the "Western System" of the Southern Railway, nor is there any-

thing in the record to show that the circumstances and conditions attending the transportation of traffic over said 'Western System" are substantially similar to those attending the transportation of traffic over the appellees' line from New Orleans to La Grange.

In said stipulation it is also agreed that "under joint freight tariff of the Southern Railway Company, I. C. C., No. 2910, issued March 2, 1898, and effective March 5, 1898," the class rates for a distance of 430 miles and over 420 miles are lower than appellees' rates from New Orleans to La Grange.

Said stipulation shows no rates under said "joint freight tariff" except for the distance "of 430 miles and over 420 miles."

If the Court should be of opinion that a comparison of appellees' rates with said "joint freight tariff No. 2910" "for a distance of 430 and over 420 miles" is of any value, the appellees' now ask the Court to remand the case with directions to the Circuit Court to call upon the appellant to file a complete copy of said tariff for all distances, or to file a statement showing the rates charged in said tariff upon the several classes for distances of 16, 89, 105, 140, 180 and 320 miles, respectively.

If said tariff or statement be filed, appellees have reason to believe that it will be found that it contains three tables, numbered 1, 2 and 3, and that in table No. 1, said rates as shown therein, are as follows:

	Miles.	Classes.												
		1	2	3	4	5	6	A	B	C	D	E	H	F
For the distance from New Orleans to Mobile	140	68	59	51	42	34	25	22	27	24	18	34	42	43
For the distance from Mobile to Montgomery	180	75	67	58	50	40	29	24	30	26	20	40	50	48
For the distance from Montgomery to West Point	89	55	46	39	32	25	20	18	22	19	16	25	32	34
For the Distance from West Point to La Grange	16	25	21	18	15	12	10	10	12	10	9	12	15	18
Total for	425	223	193	166	139	111	84	74	91	79	63	111	139	143
For the distance from New Orleans to Montgomery	320	93	83	72	60	50	40	30	38	32	27	48	58	58
For the distance from Montgomery to La Grange	105	61	52	44	36	29	22	20	24	21	17	29	36	38
Total for 425 miles	425	154	135	116	93	79	62	50	62	53	44	77	94	96
Appellees' thro' rates from New Orleans to La Grange	425	143	124	109	93	74	59	41	48	33.5	29	66	74	59

The comparison which appellant seeks to make between appellees' rates and said "joint freight tariff," assumes that the line from New Orleans to La Grange is operated by one company, whereas it was originally owned by four distinct companies; and is now operated by two independent managements.

There is nothing in the record to show what territory is covered by said "joint freight tariff;" nor is there anything to show that the circumstances and conditions attending the transportation of such traffic as may move under said "joint freight tariff" are substantially similar to those attending the transportation of traffic over the appellees' line from New Orleans to La Grange.

As shown under Section XXXIII, the burden was upon appellant to show that the circumstances and conditions attending the transportation of such traffic as may move under said "joint freight tariff" are substantially similar to those attending the transportation of traffic over the appellees' said line; and appellant having failed to introduce such testimony, the comparison between appellees' rates and said "joint freight tariff" is of no value.

XXXV.

The "Average Receipts Per Ton Per Mile" of a Road Cannot be Used as a Standard of Reasonableness for the Rates of that Road on Any Particular Traffic.

Counsel for appellants, in the Circuit Court, instituted certain elaborate comparisons involving what are known as the "average receipts per ton per mile;" and contended that said comparisons demonstrated that the rates from New Orleans to La Grange are unreasonably high.

The "average receipts per ton per mile" of a road, or, as it is sometimes termed, the "revenue per ton per mile," cannot be used as a standard of reasonableness for the rates of even that road, on any particular traffic.

Mr. J. M. Smith, the Auditor of the Interstate Commerce Commission, who was examined as a witness for appellant, was forced to admit, upon cross examination, that in his opinion it would be impracticable to use the "revenue per ton per mile" as a standard for fixing the reasonablenes of rates. He admits that it would be "very unlikely" for "the revenue per ton per mile to ever be the same, upon the same railroad, in any two successive years;" and he also admits that it would be "very unlikely" for "the revenue per ton per mile" to ever be the same upon any two divisions of even the same railroad.

Trans., p. 277.

He admits that, in his opinion, it would not be possible to ascertain the average revenue per ton per mile for any one year until after the expiration of such year; he also admits that he

knows of no case where any general freight agent or traffic manager ever used the average revenue per ton per mile as a factor in making freight rates.

Trans., pp. 277, 278.

The "average receipts per ton per mile" or the "revenue per ton per mile" is ascertained by dividing the "total freight revenue" of a railroad by the "number of tons carried one mile."

Trans., p. 276.

The "total freight revenue" of a company is ascertained by adding together the freight charges on thousands or millions of shipments, made under various conditions and circumstances. Some shipments consist of single packages, weighing perhaps less than 100 pounds. Other shipments are made in quantities of more than 100 pounds, but less than car loads; others are made in car-load quantities; and others in train-load quantities. Some of the freight shipped is very light and bulky, and of considerable value per ton; other freight consists of heavy, coarse articles, of comparatively small value per ton. Some shipments are made over short distances; others over long distances; and others over the entire length of the road. The freight charges per ton, per mile, necessarily vary within wide limits, from 8 or even 10 cents per ton, per mile, on first-class freight, carried over only a few miles of the road between local stations, to 3½ mills per ton, per mile, on long-haul coal and mineral traffic, and long distance competitive traffic.

In order to ascertain the "number of tons carried one mile," it is necessary to keep an account of the actual distance each ton is carried. Each ton is then multiplied by the number of miles it is carried, so as to get its equivalent in tons carried one mile; and the aggregate of the equivalents in tons carried one mile shows the "number of tons carried one mile."

Trans., p. 276.

Of course, in actual practice, no one ton of freight is ever carried exactly one mile, and the "number of tons carried one mile" is made up of thousands or millions of shipments of different kinds of freight, carried over different parts of the line, and carried different distances.

The "number of tons carried one mile" is of no more value in determining what are reasonable rates on each of the thirteen classes of traffic from New Orleans to La Grange, than the fact that the earth is the equivalent of a certain number of grains of sand, would be in ascertaining the reasonable price of a tombstone.

As stated above, it is by dividing the "total freight revenue" by the "number of tons carried one mile" that we ascertain the "average receipts per ton per mile."

As neither the divisor nor the dividend has the slightest relation to the reasonableness of rates, the quotient can have no relation to it.

One might as well divide the number of spikes in a railroad track by the number of crossties, and expect the quotient to show what are reasonable rates for each of the thirteen classes of traffic, between any two given points.

XXXVI.

The "Average Receipts Per Ton Per Mile" of One Road Cannot be Used as a Standard of Reasonableness for the Rates of Another Road.

In the last preceding section of this argument, I have shown that the "average receipts per ton per mile" of any given road cannot be used as a standard of reasonableness for the rates even of that road on any given traffic; and *a fortiori* it cannot be used as a standard of reasonableness for the rates of other roads.

XXXVII.

The Relative Rates on the Different Classes Remaining the Same, the "Average Receipts Per Ton Per Mile" is of No Value Except to Show the Proportions of the Tonnage of the Different Classes of Traffic.

The tonnage and rates of a road remaining the same, its "average receipts per ton per mile" will increase as the proportion which its high class traffic bears to its low class traffic, increases.

To demonstrate this fact, let us assume that the tonnage of any given road is equivalent to 2,000,000 tons carried one mile, in each of three consecutive years. During the first year, let us assume one-fourth of the tonnage to be class 1, carried at 5 cents per ton, and three-fourths of the tonnage to be class A, carried at 1 cent per ton. We would have:

500,000 tons of class 1 at 5 cents	$25,000
1,500,000 tons of class A at 1 cent	15,000
Or, 2,000,000 tons at 2 cents	$40,000

The "average receipts per ton per mile" for the first year would be 2 cents.

During the second year, let us assume one-half of the tonnage to be class 1, carried at 5 cents per ton, and the other half to be class A, carried at 1 cent per ton. We would have:

1,000,000 tons of class 1 at 5 cents	$50,000
1,000,000 tons of class A at 1 cent	10,000
Or, 2,000,000 tons at 3 cents	$60,000

The "average receipts per ton per mile" for the second year would be 3 cents.

During the third year, let us assume three-fourths of the tonnage to be class 1, carried at 5 cents per ton, and the remaining one-fourth to be class A, carried at 1 cent per ton. We have:

1,500,000 tons of class 1 at 5 cents	$75,000
500,000 tons of class A at 1 cent	5,000
Or, 2,000,000 tons at 4 cents	$80,000

The "average receipts per ton per mile" for the third year would be 4 cents.

We see that the tonnage remained the same, and the rates charged on classes 1 and A, respectively, remained the same during all three of the years; and yet the "average receipts per ton per mile" for the third year was double what it was for the first year. We see, also, that it increased precisely as the proportion which the high class traffic bore to the low class traffic increased. But the demonstration does not throw any light whatever upon the reasonableness of the rates either on class 1, or on class A.

XXXVIII.

The Average of a Number of Dissimilar Things is Misleading as to Any One of Them.

I have shown that the "average receipts per ton per mile" cannot be used as a criterion of the reasonableness of rates, because such "average receipts" has no relation whatever to the matter. But even if some relation existed, it is self-evident that the value of a thing cannot be ascertained by applying, as a measure, the average value of a number of dissimilar things,

which differ greatly in value as compared with each other, and as compared with the thing the value of which is to be measured.

The "average receipts per ton per mile" represents the average received per ton per mile by a railroad for the transportation of hundreds of thousands or millions of shipments, made under varying conditions and circumstances. As stated above, some shipments consist of single packages, weighing, perhaps, less than one hundred pounds; some shipments are made in car-load quantities; and some in train-load quantities. Some of the freights are very light and bulky, and of considerable value per ton; others consist of heavy, coarse articles of comparatively small value per ton. Some shipments are made over short distances; others over longer distances; and others over the entire length of the road. The freight receipts per ton per mile necessarily vary within wide limits, from 8 or even 10 cents per ton per mile on first-class freight carried over only a few miles of the road; to 3½ mills per ton per mile, and even less, on long-haul coal and mineral traffic.

No country merchant who keeps in his store a great variety of articles, differing greatly in value, would undertake to ascertain his "average receipts" per pound, or per yard, and to sell all of his goods to his customers at his "average receipts." He would find plenty of customers for his dry goods, but none for his coffee and sugar.

The duration of the lives of a thousand men or women would be of value in constructing tables for insuring human lives; but the duration of the lives of a thousand animals of different kinds, whose duration of life differs widely, would be of no value in constructing tables for insuring human lives; or for insuring the life of any of the thousand kinds of animals included in the average. In fact, the average of a number of dissimilar things is absolutely misleading as to any one of them.

It is stated in Edison's Encyclopedia, p. 201, that the duration of life of certain animals, etc , is estimated to be as follows:

The Whale	1,000	years.
The Swan	200	"
The Elephant	100	"
The Goose	80	"
The Lion	70	"
The Beaver	50	"
The Hawk	40	"
The Horse	30	"
The Cow	20	"
The Monkey	18	"
The Squirrel	7	"
The Wren	3	"
The Bee	$\frac{1}{2}$	"
The average for the above is	$124\frac{1}{2}$	"

An insurance company might use the average with safety in insuring an elephant for 124 years; but it would not do so in the case of a bee.

It will be noticed that the average does not represent the duration of life of any one of the thirteen animals, etc., mentioned above.

It is stated by the Commission in its Eleventh Annual Report (1897), p. 66, that the classifications now in use in this country embrace from 5,000 to 7,000 items; and when we remember that those items are transported by the railroads in varying quantities, for varying distances, and under varying circumstances as to speed, etc., it must be evident that an average of the receipts realized from the transportation of so many different articles, under so many different conditions, must be positively misleading in ascertaining what is a reasonable rate for transporting any one of those articles, for any given distance.

The sixth section of the Act to Regulate Commerce requires every common carrier subject to its provisions to file with the Commission copies of its schedules of rates. With those schedules, and with the classifications which govern them, it is practicable for the Commission to compile a table showing the rates charged by each of said carriers upon each of the articles covered by the classifications, and for each of the distances over which the article may be carried. From such tables, it might be shown what is the average rate received per ton per mile, on each of those articles, by all the railroads in this country. And though the conditions under which different railroads operate vary widely, there might be some plausibility in insisting that the average receipts per ton per mile realized by all the railroads in this country from the transportation of a given article, as for instance bituminous coal, should be taken as presumptive evidence of the reasonableness of that rate, wherever the matter might be drawn in question. But the "average receipts per ton per mile" relied upon in argument by counsel for the appellant is not the "average receipts per ton per mile" *of any given article, or of any given class of freight, or even of all classified freight*, but it is an average of all the articles and commodities (whether classified or not), that may be carried by a railroad, however dissimilar in nature those articles and commodities may be.

XXXIX.

The Use of the "Average Receipts" as a Standard in Rate Making Would, by Successive Repetitions, Reduce All Rates to Zero.

The official classification contains six classes, numbered from 1 to 6. Let us assume that the rates charged by a certain railroad, for a certain distance, on the several classes, are, in cents per 100 pounds, as follows:

On class 1..... 6 cents
On class 2..... 5 cents
On class 3..... 4 cents
On class 4..... 3 cents
On class 5..... 2 cents
On class 6..... 1 cent

The average of said rates is 3.5 cents. If the average of rates is to be taken as the standard of reasonableness, the rates on the first three classes would be too high, inasmuch as they exceed the average; and, in revising the tariff, the new rates would be as follows:

On class 1..... 3.5 cents
On class 2..... 3.5 cents
On class 3..... 3.5 cents
On class 4..... 3 cents
On class 5..... 2 cents
On class 6..... 1 cent

The average of those rates is 2.75 cents; and again using the average as a maximum, the second revision would stand as follows:

On class 1..... 2.75 cents
On class 2..... 2.75 cents
On class 3..... 2.75 cents
On class 4..... 2.75 cents
On class 5..... 2 cents
On class 6..... 1 cent

The average of those rates is 2.33 cents; and again using the average as a maximum, the third revision would stand as follows:

On class 1..... .....2.33 cents
On class 2..... ... .2 33 cents
On class 3..... .....2.33 cents
On class 4.....2.33 cents
On class 5..... .....2 cents
On class 6..... .. 1 cent

The average of those rates is 2.05 cents; and again using the average as a maximum, the fourth revision would stand as follows:

On class 1..... 2.05 cents
On class 2..... .....2.05 cents
On class 3 ....2.05 cents
On class 4.....2.05 cents
On class 5..... .....2 cents
On class 6.....1 cent

The average of those rates is 1.86 cents.

The foregoing illustrations are sufficient to demonstrate that if the average of rates is to be the standard of reasonableness, all rates above the average must be adjudged to be too high, and be reduced so as not to exceed the average; that at each revision the average is necessarily reduced; and that it requires only a certain number of revisions to reduce all the rates to zero.

XI.

If the "Average Receipts Per Ton Per Mile" Could be Used at All in Rate Making, it Could Only be Used in Connection with Other Things; and Even Then it Could be Used Only in Judging of the Reasonableness of the Schedule as a Whole.

Mr. J. M. Smith, Auditor of the Interstate Commerce Commission, upon cross examination by appellees, said:

"In my opinion it would be impracticable to use the 'revenue per ton per mile' (*i. e.*, the 'average receipts per ton per mile') as a standard for fixing the reasonableness of rates. At the same time the 'revenue per ton per mile' on all classes of traffic of a railroad *might* serve a useful purpose in determining the reasonableness of its rates *in general* by comparison with the average rate per ton per mile of other roads *similarly situated*."

Trans., p. 277.

Mr. Smith is careful to confine his opinion to the reasonableness of the rates of a company "*in general;*" and even in that case he restricts the comparison to roads "*similarly situated.*"

In Section XX, I have shown that in determining the reasonableness of the rates of a company, its schedule "as a whole" must be considered; and that it is impossible to determine the reasonableness of rates upon a particular article, or upon a particular portion of the traffic carried by a company, without considering what its rates are on the other articles, or on the other portions of traffic carried by it. I understand Mr. Smith to concur in this view, when he says that the revenue per ton per

mile "*might* serve a useful purpose in determining the reasonableness" of the rates of a company "*in general*;" *i. e.*, in determining the reasonableness of its "schedule, taken as a whole."

Counsel's contention is that if the "revenue per ton per mile" —*i. e.*, "the average receipts per ton per mile," is useful in determining whether appellees' rates "*in general*" are excessive, it must be useful in determining whether the rates on that portion of appellees' traffic which moves from New Orleans to La Grange, are excessive.

It would be equally logical to contend that if a certain factor, *in connection with others*, may enable us to solve a certain equation, the same factor will, in the absence of the others, enable us to solve any part of the equation.

If you ask a gas company (engaged in the manufacture of gas) what it costs that company to produce a ton of coke, its reply must be that this depends on what the public will pay for the gas. And if you ask the company what it costs to produce a thousand cubic feet of gas, its reply must be that this depends on what the public will pay for the coke.

The working expenses of the whole operations of the company are so much. The result of those operations is the output of a certain quantity of gas, and a certain quantity of coke. But you cannot say what is a reasonable rate to be charged for the gas, until you know what rate the company can obtain for the coke; and you cannot say what is a reasonable rate to be charged for the coke, until you know what rate the company can obtain for the gas. If the company can obtain such rates for the gas as will enable it to approximate a fair return on its investment, it can afford to accept exceedingly low rates on the coke.

Now take, on the other hand, a coke company engaged in

manufacturing coke for neighboring blast furnaces. It can use in heating its coke ovens, a certain quantity of the gas which is produced in making the coke, but no more; and for the remainder of the gas produced, the company has probably no market at all. In this case, evidently, the coke must be looked to as the main reliance to earn a fair return on the investment, and the most that can be expected of the gas is that it shall help, in some slight degree, to lighten the burden.

In the case of a railroad company, the result of its operations *as a whole* is the transportation of a certain number of passengers, a certain quantity of mail and express matter, and a certain number of tons of freight; and to those operations, *as a whole*, it must look for a reasonable return upon the fair value of its investment.

What is denominated "local tariff" is affected by competition between product and product, and competition between "market and market."

What is denominated "competitive tariff" is affected not only by competition between product and product, and competition between market and market, but also by competition between carrier and carrier.

In the case of one railroad company, only one-fourth of its traffic may be "local," and the remaining three-fourths "competitive;" while, in the case of another company, the proportions may be exactly reversed.

Whatever may be the proportion which the "competitive traffic" bears to the "local traffic" of a company, the company must, of necessity, accept such rates on its "competitive traffic" as its rivals may offer; and if the revenue derived from its "competitive traffic" fails to pay a reasonable return upon the value

of the investment, the deficit must be made up by increasing the rates on the "local traffic"—if it be possible. And if competition between product and product, or between market and market, prevents an increase in the rates on the "local traffic," the company must cease operations.

In the case of a railroad company, as in cases of the gas company, and the coke company, referred to above, you must look to the operations of the company *as a whole*, and before you can decide whether the rates charged upon one source of revenue are reasonable, you must ascertain what amount can be realized by the company from its other sources of revenue.

We see, therefore, that while, as Mr. Smith says, such data as the "revenue per ton per mile," *i. e.*, the "average receipts per ton per mile," "might" possibly be useful in determining whether the rates of a company, "*in general*," are excessive, it is of no value whatever in determining the reasonableness of rates charged on any particular portion of the traffic carried by the company.

In other words, as shown above in Section XX, in order to determine whether the rates of a railroad company are reasonable *its operations as a whole* must be considered.

XLI.

"The Average Receipts Per Ton Per Mile" is Kept by Railroads in Obedience to Orders of the Interstate Commerce Commission, and Not for Rate-making Purposes.

Counsel for appellant, in the Circuit Court, referred to the fact that "the average receipts per ton per mile" has been kept and recorded by the railroads; and he contended that it has been kept by them for the purpose for which he seeks to use it in this case; namely, to ascertain whether rates are too high or too low.

Section 20 of the Act to Regulate Commerce authorizes the Commission to require annual reports from all railroads that are subject to the act, and "to prescribe the manner in which such reports shall be made."

The Commission has prescribed the form of such reports, and each railroad is furnished by the Commission with a printed blank upon which to make its reports. Page 61 of said blank calls for the "average receipts per ton per mile," and, of course, all railroads that are required to make said reports, so keep their books as to be able to show the "average receipts per ton per mile." A copy of page 61 of the blank furnished by the Commission is filed as Exhibit "E" (9) to the deposition of G. C. Smith taken before the Commission.

Trans., pp. 96, 152, 153, 154.

While the railroads report to the Commission the "average receipts per ton per mile," it has never been used by the railroads in rate construction; and for the simple reason that freight rates must be controlled by commercial laws affecting competition; and cannot be fixed by arbitrary formulæ.

No practical traffic manager ever used any such data in the construction of a freight schedule; and no one else has ever attempted to do so, except the Interstate Commerce Commission.

Mr. J. M. Smith, the Auditor of the Commission, was forced to admit on cross-examination that he never knew of any general freight agent, or traffic manager, who used the "average revenue per ton per mile" as a factor in making freight rates.

Trans., pp. 277, 278.

Mr. Smith says that he is not familiar with the methods or bases used by the various traffic officials throughout the country in fixing their freight rates; but he admits that from January 1,

1888, to the present time, he has been Assistant Auditor, or Chief Auditor, of the Commission; and that for fourteen years before he entered the service of the Commission, he was, for most of the time, in the general freight department of the Louisville & Nashville Railroad.

Trans., p. 251.

He was introduced by the complainant as an expert in this case.

XLII.

Freight Rates are Controlled by Practical Commercial Considerations; and They Cannot be Adjusted by Mathematical Calculation.

One of the chief errors into which the Commission has fallen in attempting to fix rates for carriers, as well as in attempting to judge of the rates fixed by carriers, is in supposing that rates can be constructed according to certain mathematical formulæ; that some kind of an equation can be invented, in which certain statistical data can be arranged as factors, and that by the solution of such equations it can be ascertained what are reasonable rates on any given article of freight, for any given distance on any given railroad. Among the factors which it has attempted to use in constructing such equations have been the "average receipts per ton per mile;" the "estimated cost of carrying one ton one mile;" the "number of tons carried of freight earning revenue;" the "average distance haul of one ton;" the "freight earnings per train mile," etc. But neither one, nor all, of such factors can be used in the practical business of rate-making.

Rates of freight are subject to the commercial law of supply and demand. Competition between rail lines and water lines; competition between product and product; and competition between market and market are the factors which must govern railroad companies in the establishment of tariffs. No railroad

freight tariff, not even a local freight tariff, can now be established arbitrarily by a railroad company. In fact, it cannot be truthfully said that railroad companies make their rates at all, at the present time. All that they can now do is to adjust them, from time to time, to the surrounding conditions and circumstances as they may exist, and no regard can be paid to any kind of mathematical formulæ, or scientific theories.

In Texas & Pacific Ry. Co. v. I. C. C., known as the "Import Case," this Court quotes from Wills, Judge, the following:

"I first observe that these are, in my judgment, eminently practical questions, and if this Court once attempt the hopeless task of dealing with questions of this kind with any approach to *mathematical accuracy*, and tries to introduce a precision *which is unattainable in commercial and practical matters*, it would do infinite mischief and no good."

162 U. S., p. 225, T. & P. Ry. Co. v. I. C. C.

This Court also quotes from Lord Herschell as follows:

"I quite agree with Mr. Justice Wills that it is impossible to exercise a jurisdiction, such as is conferred by this section *by any process of mere mathematical or arithmetical calculation*. When you have a variety of circumstances, differing in the one case from the other, you cannot say that a difference of circumstances represents, or is equivalent to such a fraction of a penny difference of charge, in the one case, as compared with the other. A much broader view must be taken, and *it would be hopeless to attempt to decide a case by any attempted calculation*. I should say that the decision must be arrived at broadly and fairly, by looking at all the circumstances of the case, that is, looking at all the circumstances which are proper to be looked at."

162 U. S., pp. 227, 228, T. & P. Ry. Co. v. I. C. C.
73 Fed. Rep., p. 421, I. C. C. v. L. & N. R. R.
74 Fed. Rep., p. 721, I. C. C. v. Ala. Mid. Ry. Co. et a

XLIII.

Appellant's Comparison of Appellees' Rates from New Orleans to La Grange with the Average Receipts Per Ton Per Mile of All Railroads in the United States.

The Commission, in its report and opinion, refers to the fact that the appellees' rates from New Orleans to La Grange yield more revenue per ton per mile than "the average revenue received on all traffic by all roads in the United States for the year ending June 30, 1895."

Trans., p. 37.

In the "Statistics of Railways in the United States" (1895), published by the Commission, it is stated that the railways of the United States closed the year covered by the report (*i. e.*, the year ending June 30, 1895) *with a deficit*, from the operations of the year, of $29,845,241; and that they closed the preceding year, ending June 30, 1894, *with a deficit* of $45,851,294; "showing that the railways of the United States have run behind during the two years in question $75,696,535. Should this continue, *either the investments or the credit of railways must disappear.*"

Statistics of Railways, 1895, p. 58.

This Court has held that a railroad company "is entitled to a fair return upon that which it employs for the public convenience."

169 U. S., pp. 546, 547, Smyth et al. v. Ames et al.

I submit with great confidence that this Court ought not to compel the appellees to reduce the rates from New Orleans to

La Grange to a point that will yield not more than the average revenue per ton per mile received by "all the railroads in the United States for the year 1895," when it appears that the operations of "all the railroads in the United States" for that year resulted in a deficit of nearly $30,000,000, which followed a deficit of over $45,000,000 for the next preceding year, 1894.

XLIV.

Appellant's Comparison of Appellees' Rates from New Orleans to La Grange with the Average Receipts Per Ton Per Mile of All Railroads in Group V.

The Commission, in its report and opinion, refers to the fact that the appellees' rates from New Orleans to La Grange yielded more revenue per ton per mile than the average revenue received on all traffic, by all roads, in Group V (which includes the appellees' roads), for the year ending June 30, 1895.

Trans., p. 37.

It appears from the "Statistics of Railways in the United States," published by the Commission, that during nine years, beginning June 30, 1890, and ending June 30, 1898, the roads in Group V were operated at a net deficit of $5,159,610.

See Statistics of Railways, 1890, p. 56.
See Statistics of Railways, 1891, p. 76.
See Statistics of Railways, 1892, p. 53.
See Statistics of Railways, 1893, p. 51.
See Statistics of Railways, 1894, p. 57.
See Statistics of Railways, 1895, p. 59.
See Statistics of Railways, 1896, p. 65.
See Statistics of Railways, 1897, p. 67.
Preliminary Report on the Income Account of Railways, 1898, p. 19.

I submit, with great confidence, that this Court ought not to compel the appellees to reduce the rates from New Orleans to La Grange to a point that will yield not more than the average revenue per ton per mile, received by the railroads in Group V, when it appears that said railroads have for the last nine years been operated at a net deficit of more than $5,000,000.

XLV.

Appellees' Schedules as a Whole Do Not Yield More Than a Fair Return Upon the Capital Invested.

I have shown in Section XX that in considering the reasonableness of rates it is impossible to determine the reasonableness of a rate upon a particular article, or of the rates upon a particular portion of a company's traffic, without considering the company's schedule of rates as a whole.

The Commission, in its report and opinion, says:

"The actual paid in or working capital of the Atlanta & West Point Road is therefore not in excess of $1,232,200 or $14,378.06 per mile, and on this the stockholders have been receiving a return of 12 per cent annually after paying all expenses of operation, repairs, and improvements. They received such return in 1890, and for every year covered by annual reports to the Commission, including the year ending June 30, 1897."

Trans., pp. 38, 39.

Counsel for appellant contends that 12 per cent annually, after paying all expenses of operation, etc., is more than a fair return upon the capital invested.

It is useless, however, to discuss that question; because the Commission is in error in saying that the stockholders of the

Atlanta & West Point Railroad have been receiving a return o
12 per cent upon the capital invested.

They have received an amount equal to 12 per cent upon th
money which they paid into the treasury of their company *i*
discharge of their stock subscriptions; but the money paid upo
their *stock* subscriptions does not represent more than one hal
the money which the stockholders *have invested in the road.*

The capital stock of the Atlanta & West Point Railroad Com
pany is $1,232,200; and the dividend paid upon it is only 6 pe
cent.

Trans., p. 94.

The total amount of its funded debt is $1,232,200; and th
interest paid upon it is only 6 per cent.

Trans., pp. 94, 95.

Said funded debt consists of "certificates of indebtedness,
issued by the company to its stockholders to represent earning
of the road which belonged to the stockholders, and could hav
been legally and properly distributed among them as dividend
but which were used by them in the permanent betterment o
the road.

Trans., pp. 137, 138.

Earnings which could have been properly distributed as divi
dends, but which have been judiciously used in the permanen
betterment of a road, represent "*capital invested by the stock
holders,*" as truly as money which they paid into the treasury o
the company in discharge of their stock subscription.

This Court has held that in ascertaining the value of
road, upon which value "the company is entitled to ask a fai
return," it is proper to consider, not only the original cost o

construction, but also "*the amount expended in permanent improvements.*"

169 U. S , pp. 546, 547, Smyth et al. v. Ames et al.

The earnings of the Atlanta & West Point Railroad, which, instead of being distributed as dividends among the stockholders, were "expended in permanent improvements," may, therefore, be legitimately considered as entering into the value of the road upon which the company is entitled to a fair return.

Again: In the case last cited, this Court held that "the *present*, as compared with the *original* cost of construction" may be considered. The "*present*" cost is represented by the "original" cost plus "the amount expended in permanent improvements;" and therefore in considering the "*present*" cost of the Atlanta & West Point Railroad, its stockholders are entitled to a return upon that part of the capital which is represented by so much of their earnings as were expended "in permanent improvements."

If the earnings of the Atlanta & West Point Railroad which have been expended "in permanent improvements" be considered, the stockholders of that company, instead of receiving a return of 12 per cent, as erroneously reported by the Commission, have received only 6 per cent upon the capital invested by them; and I submit that 6 per cent is not more than a fair return upon their investment, especially when we consider the extra-hazardous character of railway investments.

Railroads are at all times subject to disastrous losses resulting from failure of crops, or the prevalence of epidemics in the territories through which they run; their property seems to be peculiarly subject to destruction by storms and floods; and however well located a railroad may be, it is liable to be paralleled at any time by a competing line, constructed under a charter

which is granted by a general law, and at the instance of any one who may apply.

Appellees' line from New Orleans to La Grange is 425 miles long; of that mileage, however, the Atlanta & West Point R. R. Co. owns but 16 miles, *i. e.*, from West Point to La Grange. In other words, the Atlanta & West Point R. R. Co. does not own more than 1-26 of the entire line.

That part of the line between West Point and Montgomery—a distance of 89 miles—is owned by the Western Railway of Alabama; and the remainder of the line, *i. e.*, between Montgomery and New Orleans—a distance of 320 miles—is owned by the Louisville & Nashville R. R. Co.

The Commission reports that the Western Railway of Alabama paid a dividend of 2 per cent; but it does not report that the Louisville & Nashville R. R. Co. paid any dividend at all.

Trans., p. 37.

If the dividend paying qualities of a railway property are to control, the question in this case ought to be as to what dividends have been paid by the 425 miles of railway line which extends from New Orleans to La Grange; and the dividend paying qualities of the Atlanta & West Point R. R. Co., which does not own exceeding 1-26 of that line, ought not to be given an undue prominence.

XLVI.

The Capitalizations Per Mile of the Atlanta & West Point Railroad, and the Western Railway of Alabama, are Less than the Average Capitalization of all the Railroads in the United States.

The capitalization per mile of the Atlanta & West Point Railroad Company consists of:

Capital stock	$14,378 06
Funded debt	14,378 06
Total capitalization per mile	$28,756 12

Said capitalization represents the "present cost" per mile of said road.

Trans., p. 95.

The capitalization per mile of the Western Railway of Alabama consists of:

Capital stock	$22,539 00
Funded debt	11,593 00
Total capitalization per mile	$34,132 00

Said capitalization represents the "present cost" per mile of said road.

Trans, p. 96.

The average capitalization per mile of all the railroads of the United States as shown by the Annual Report of the Interstate Commerce Commission for the year ending June 30, 1895, is $63,206.06.

Trans, p. 98.

I submit that the fact that the capitalizations per mile of the Atlanta & West Point Railroad, and the Western Railway of Alabama, are so much less than the average capitalization per mile of the railroads of the United States, raises a presumption, at least, that the capitalizations of the Atlanta & West Point Railroad, and of the Western Railway of Alabama, contain no "watered" stock, or fraudulently issued bonds. Said presumption is strengthened by the testimony of the President of said companies to the effect that it would cost from $30,000 to $35,000 per mile at the present time, to duplicate the Atlanta & West Point Railroad, and the Western Railway of Alabama, including their terminals.

Trans., p. 98.

The Atlanta & West Point Railroad pays only 6 per cent per annum on its "present cost" of $28,756.12 per mile.

Trans., pp. 94, 95.

The Western Railway of Alabama pays less than 3 per cent per annum on its "present cost."

Trans., p. 96.

I submit that such returns upon the value of the property used by those companies for the benefit of the public, are not unreasonably high; but, on the contrary, are reasonably low.

XLVII.

The Percentage of Operating Expenses to Earnings of the Atlanta & West Point Railroad, and of the Western Railway of Alabama, is Less than the Average of All the Railroads in the United States.

The percentage of operating expenses to earnings from operations for the year ending June 30, 1895, was:

On the Atlanta & West Point Railroad.....58.43 per cent
On the Western Railway of Alabama..... .....66.13 per cent
On all the roads in the United States.....67.48 per cent
Trans., p. 37.

I submit that the fact that the percentage of operating expenses of the Atlanta & West Point Railroad, and of the Western Railway of Alabama, is less than the average of all the other railroads in the United States, raises a presumption, at least, that the Atlanta & West Point Railroad, and the Western Railway of Alabama, are operated honestly and economically; that no extravagant salaries are paid to officers; and that no extravagant prices are paid for materials or supplies.

Said presumption is strengthened by the testimony of the President of said companies, who states said roads are operated honestly, skillfully, and economically.
Trans., p. 97.

The schedule of rates taken as a whole may be very high, and yet the operations of a railroad may be conducted so dishonestly, unskillfully, or extravagantly, that the expenses absorb the earnings, and leave nothing for dividends.

Or, as in the case at bar, the schedule of rates taken as a whole may be reasonably low, and yet the operations of a railroad may be conducted with such skill, honesty, and economy, that after paying all expenses, and fixed charges, there is a surplus left, sufficient to pay a dividend to stockholders.

XLVIII.

The Appellees' Rates from New Orleans to La Grange Do Not Include a Charge for Service Not Rendered.

Appellant's counsel, in the Circuit Court, contended that as appellees' rates from New Orleans to La Grange are equal to rates from New Orleans to Atlanta, and back to La Grange; and as New Orleans-La Grange freight is not carried to Atlanta, and then back to La Grange; but is delivered at La Grange; the appellees collect a charge for service from La Grange to Atlanta, and back to La Grange, when no such service is, in fact, rendered.

Counsel is mistaken in asserting that appellees collect a charge for service from La Grange to Atlanta, or from Atlanta back to La Grange.

New Orleans-La Grange freight is carried under through bills of lading, which, of course, specify La Grange as the point of delivery. It is thoroughly understood by all parties, that New Orleans-La Grange freight is to be delivered at La Grange, and that it is not to be carried to Atlanta and then back to La Grange.

The appellees' charge is made for carrying freight from New Orleans to La Grange, a distance of 425 miles; and appellees insist that said charge is not only reasonably low for the service

actually rendered; but lower than it would be if distance could control, and the rates could be based on Montgomery.

Appellees so adjust their rates from New Orleans to La Grange that said rates will not exceed the rates to Atlanta, and the rates thence back to La Grange; but this is done, not because appellees charge for service to Atlanta, and back to La Grange; but because, by reason of the competition of the Illinois Central Railroad, and the Southern Railway, appellees' charge for service actually rendered from New Orleans to La Grange (425 miles) cannot be made higher than their competitors' rates to Atlanta, and the local rates thence to La Grange.

XLIX.

Combination Rates are Just and Reasonable in and of Themselves.

Combination rates, as they are termed, are made upon a basis or method by which rates to noncompetitive points are arrived at by adding to competitive rates prevailing at the nearest competitive point, reasonable local rates from such competitive point to the noncompetitive points in its vicinity. And I insist that such rates are just and reasonable.

In the case of A. T. & S. F. R. R. v. D. & N. O. R. R., 110 U. S., p. 684, this Court held that at common law a railroad company is not bound to carry beyond its own line; and it has been repeatedly held at Circuit that there is nothing in the Act to Regulate Commerce to compel connecting railroads to form through routes, or to join in making through rates.

37 Fed. Rep., 572, K. & I. Bridge Co. v. L. & N. R. R. Co.

41 Fed. Rep., 563, L. R. & M. R. Co. v. St. L., I. M. & S. Ry. Co.

51 Fed. Rep., 474, 475, O. S. L. & U. N. Ry. Co. v. N. P. R. Co.

52 Fed. Rep., 915, C. & N. W. Ry. Co. v. Osborne.

59 Fed. Rep., 402, 403, L. R. & M. R. Co. v. St. L. I. M. & S. Ry. Co.

63 Fed. Rep., 778, 779, L. R. & M. R. Co. v. St. L. & S. W. Ry. Co.

65 Fed. Rep., 41, St. Louis Drayage Co. v. L. & N. R. R. Co.

86 Fed. Rep., 419, Gulf C. & S. F. Ry. Co. v. Miami S. S. Co.

88 Fed. Rep., 662, Southern Indiana Exp. Co. v. U. S. Exp. Co.

93 Fed. Rep., p. 92, I. C. C. v. W. & A. R. R. Co., et al.

The Louisville & Nashville Railroad is under no legal obligation to issue a bill of lading, or to quote a rate, from New Orleans to La Grange; because La Grange is not on its line.

When freight is shipped from New Orleans, consigned to La Grange, the Louisville & Nashville Railroad Company is bound to receive it; carry it to Montgomery; and there deliver it to the next carrier in the route; but it has the right to charge on such freight its reasonable local rate from New Orleans to Montgomery.

The carriage service which is rendered by the Louisville & Nashville Railroad Company in the transportation of freight from New Orleans, consigned to La Grange, is substantially the same as the carriage service rendered by it in the transportation of freight shipped from New Orleans consigned to Montgomery.

In each case, that company receives the freight at New Orleans, and carries it to Montgomery. If the freight be consigned to Montgomery, the company delivers it to the consignee at the company's depot there; while if the freight be consigned to La Grange, the company delivers it to the next carrier in the route.

The carriage service rendered by the Louisville & Nashville Railroad Company being substantially the same, it has the right to charge substantially the same rate, whether the freight be consigned to Montgomery, or to La Grange.

On the other hand, the Western Railway of Alabama, and the Atlanta & West Point Railroad, have the right to refuse to recognize a through bill of lading issued from New Orleans; because it is not a point on their line.

When freight is shipped from New Orleans, consigned to La Grange, they are bound to receive it at Montgomery; carry it to La Grange; and there deliver it to the consignee; but they have the right to charge on such freight their reasonable local rate from Montgomery to La Grange.

110 U. S., 684, A. T. &. S. F. R. R. v. D. & N. O. R. R.

The carriage service which is rendered by them in the transportation of freight shipped from New Orleans, consigned to La Grange, is substantially the same as the carriage service rendered by them in the transportation of freight which originates at Montgomery, consigned to La Grange. If the freight be shipped from New Orleans, they receive it from the Louisville & Nashville Railroad; while if the freight originates at Montgomery, they receive it from the consignee; and in either case they carry the freight to La Grange, on the same train, and deliver it to the consignee.

The carriage service rendered by them being substantially

the same, they have the right to charge substantially the same rate whether the freight be shipped from New Orleans, or originates at Montgomery.

If the Louisville & Nashville Railroad Company should insist upon charging its reasonable local rate from New Orleans to Montgomery, and the Western Railway of Alabama and the Atlanta & West Point Railroad should insist upon charging their reasonable local rate from Montgomery to La Grange, the sum of those locals would be more than the rates which appellees now charge from New Orleans to La Grange.

Trans., pp. 10, 11, 118, 119.

The mere fact that the Louisville & Nashville Railroad, the Western Railway of Alabama, and the Atlanta & West Point Railroad, have endeavored to accommodate the public at La Grange by joining in through rates, and recognizing through bills of lading, which the public have no right to require as a matter of law, furnishes no reason for adjudging the through rates to be unreasonably high; especially as they are less than they would be if made by combining the reasonable local rates which those roads would have respectively charged, if such through rates had not been agreed upon, and such through bills of lading had not been recognized. If the local rates charged by those roads for transportation over their respective lines are just and reasonable, through rates *which are less* than a combination of said local rates must themselves be just and reasonable.

Any other view of this question will force the Southern railroads to abandon the system of through rates, and through bills of lading, in order to be allowed to charge their own reasonable local rates.

Such a course would not result in any decrease in the rates between different points.

On the contrary, it would result in an increase of charge; because it would force the carriers to return to the mode of doing business which prevailed before the present system of through rates, and through bills of lading was adopted. In former times, a person doing business at New Orleans, who wished to ship to La Grange, would consign the shipment in the care of a commission merchant at Montgomery. The total charges on such a shipment would be made up, of the local rate from New Orleans to Montgomery; the commission merchant's factorage charge at Montgomery; and the local rate of the Western Railway of Alabama, and the Atlanta & West Point Railroad from Montgomery to La Grange. In a word, the total charge would exceed the present through rate, by the excess of the sum of the local rates over the present through rates, and also by the amount of the commission merchant's factorage charge at Montgomery; and the public would be deprived of the convenience of through rates, and through bills of lading.

In Minneapolis & St. Louis R. Co. v. Minnesota, 186 U. S., p, 259, it was contended "that the sum of two reasonable local rates cannot be unreasonable," as a through rate; but it is wholly unnecessary for me to contend for that proposition in this case. My contention here is that a through rate *which is less* than the sum of two or more reasonable local rates cannot be unreasonable; especially where it does not exceed a low competitive rate (as from New Orleans to Atlanta), by more than a reasonable local rate (as from Atlanta to La Grange).

Minneapolis & St. Louis R. Co. v. Minnesota, 186 U S., p. 259.

L.

COMBINATION RATES ARE NOT PECULIAR TO THE SOUTH.

In its Eleventh Annual Report the Commission says:

"We have before us at the present time a complaint which alleges that the rate from Chicago, Ill., to Kearney, Neb., is discriminating and unlawful. The rate is made in this way: There is an interstate rate from Chicago to Omaha. The rate from Omaha to Kearney is fixed by the Railroad Commission of the State of Nebraska. The through rate from Chicago to Kearney is made by adding to the through rate to Omaha, the local rate from Omaha to Kearney. Merchandise is transported by continuous shipment upon through bills of lading from Chicago to Kearney at this rate." . . . "We might order a reduction of the whole rate, *but we could not determine how that reduction should be shared by the different carriers.* If the carriers refuse to agree about that, *it is difficult to see how the order could be enforced.* Clearly, *to make and enforce such an order we must have power to determine the divisions of this through rate between the different roads making up the joint line.*

"Kearney is but one of thousands of places to which the through rate is made upon this same plan. A large part of interstate rates are joint rates, in reference to which the same thing would be true."

11 Ann. Rep., I. C. C. (1897), p. 27.
Trans., p. 274.

Through rates from Boston, New York, Philadelphia, and Baltimore to points west of Chicago, and to points west of the Mississippi River, are combination rates, made by adding rates

from Boston, New York, etc., to the Mississippi River, to rates from said river to points west thereof.

Trans., pp. 115, 116.

Through rates from points east of the Missouri River to points west of that river, are, in many cases, combination rates, made by adding rates from points of shipment to said river, to rates from said river to points of destination west thereof.

Trans., p. 116.

Rates from points north of the Ohio River, to points south of said river, are, to a very large extent, combination rates, made by adding rates from points of shipment to said river, to rates from said river to points of destination south thereof.

Trans., p. 116.

Rates from points east of the Mississippi River, to points in Texas and Arkansas, are, to a very large extent, combination rates, made by adding rates from points of shipment to said river to rates from said river to destination.

Trans., p 116.

LI.

The Principles upon Which Combination Rates are Made.

There are three principles upon which combination rates are made.

First: That all rates should increase in proportion to distance, if competition will permit.

Second: That where competition conflicts with distance, competition must control.

Third: That those cities, which by reason of their strategetical position can command competitive rates, are entitled to the advantage of their location.

The Commission not only concedes that all rates should be constructed according to distance, but it insists that where distance and competition conflict, distance should control; and that railroad companies have no right to recognize the strategetical advantages, which competitive places enjoy, unless the railroads reduce all of their noncompetitive rates to the level of their competitive rates.

Suppose the line A–B–C to represent a railroad. The Commission and the appellees agree that in the absence of competition, the rates from A to C should not be less than the rates from A to B; because, the distance from A to C is greater than the distance from A to B.

If C be a city, whose strategetical position is such as to enable it to command competitive rates, which are less than might reasonably be charged from A to C, in the absence of competition, the appellees contend that they have the right to accept the competitive rates prevailing at C, provided they yield something more than the additional cost of moving that traffic, and subserve the public interest; and that the fact that they accept such rates at C, as competition at that place may force them to accept, furnishes no reason why they should be compelled to accept as low rates at B, where no competition whatever exists.

On the other hand, the Commission contends that notwithstanding the competition at C may compel the appellees to ac-

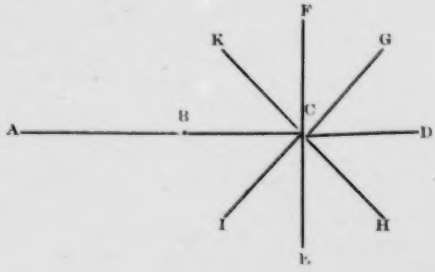
cept less rates from A to C, than might be reasonably charged in the absence of competition, they shall not do so, unless they accept equally low rates at B; though there may be no competition whatever at that point.

According to the contention of the Commission, a railroad in accepting lower rates to a competitive point than might otherwise be reasonably charged, must do so under penalty of reducing all of its intermediate noncompetitive rates to the level of the competitive rates beyond.

As there is no such competition at B as at C the appellees contend that rates from A to B should be constructed according to distance, *i. e.*, that the charge should be reasonable, considering the length of the haul. It may be, however, that the competitive rates from A to C are so low, and B may be located so near to C, that a merchant living at B would find it to his interest to pay rates which are equal to the competitive rates from A to C, added to the local rates from C back to B, rather than pay the rates from A to B constructed upon a distance basis. By that plan, he would get precisely the same benefit of the competition which exists at C as though he were doing business at C; and he would only pay, in addition thereto, rates equal to reasonable local rates from C to B.

In other words, the merchant rather than pay the rates from A to B, constructed upon a distance basis, *would himself use a combination rate* by having his goods shipped from A to C, under the competitive rates, and from C back to B, under the local rates, as the La Grange merchants would do, if the rates charged by the appellees from New Orleans via Atlanta to La Grange exceeded the competitive rate to Atlanta, added to the local rate from Atlanta back to La Grange. A railroad owning the line from A to C, and knowing that a merchant at B can avail

himself of a combination of rates such as I have just referred to, accepts rates, which are not higher than can be obtained by such a combination, and saves the merchant at B the trouble and delay of shipping his goods from A to C, and thence back to B; just as the appellees save the La Grange merchants the trouble and delay of shipping their goods from New Orleans to Atlanta, and thence back to La Grange. In other words, the railroad gives to the merchant at B, although it is a noncompetitive point, all the benefit of the competition that exists at C; and instead of requiring him to ship his goods to C, and thence back to B, it delivers them to him direct at B; and at a rate less than the rate from A to B would be, if constructed upon a distance basis.



In the diagram first set forth in this section, I have supposed that the noncompetitive point B is located between A, and the competitive point C. It is manifest, however, that the noncompetitive point may be located beyond the competitive point C; as, for instance, at the point D, or E, or F, or G, or H, or I, or K. It is wholly immaterial whether the noncompetitive point be located between A and C, or beyond C. It gets all that it is entitled to when it is allowed the full benefit of the competition that exists at C, and is only required to pay, in addition to the competitive rates prevailing at C, rates equal to reasonably low local rates from C to destination.

In this case, the local rates from Atlanta to La Grange are reasonably low.

Trans., pp. 385, 386, 391, 392, 370, 276, 381, 382.

The Commission as well as the appellees agree that noncompetitive points should have all the benefit of such competition as may exist at the nearest competitive point. The precise point of difference between the Commission and the appellees is, that the Commission contends that noncompetitive points shall have precisely the same rates as if they were located exactly where the competitive point is located; while the appellees contend that the noncompetitive points should pay in addition, rates equal to reasonably low local rates from the competitive point, to destination.

In the case at bar, if La Grange desires to have its rates from New Orleans constructed upon a distance basis, the appellees would be perfectly willing to so construct them; because as shown above, the rates from New Orleans to Montgomery, added to the rates from Montgomery to La Grange (which would be constructing the La Grange rates according to distance), would be higher than the rates which the appellees now charge from New Orleans to La Grange.

Trans., p. 197.

La Grange, however, is not content with rates constructed on a distance basis. It not only claims the benefit of the competitive rates which prevail at Atlanta, but it insists upon having the benefit of those rates precisely as if La Grange were located exactly where Atlanta is located; and it refuses to pay anything whatever in addition to those rates.

If it be held that Southern railroads cannot accept rates which competition forces upon them at such points as Atlanta, except at

the peril of reducing their rates at intermediate noncompetitive stations to the same level, its manifest tendency will be to deter railroad companies in Southern territory from engaging in competition; and it will have more effect toward stifling railroad competition in the South than any contract, combination or conspiracy denounced by the Anti-Trust Act of Congress.

LII.

The Combination Rates which Were Approved in the Alabama Midland Case.

There were a number of combination rates which the Commission declared to be illegal, but which were approved by the Circuit Court, by the Circuit Court of Appeals, and by this Court, in the Alabama Midland case.

In that case, Montgomery was the competitive point, and Troy the noncompetitive point.

1. On cotton shipped from Troy to New Orleans, there was a combination rate, equal to a rate made by adding the full local rate from Troy to Montgomery, to the competitive rate from Montgomery to New Orleans.

2. On class goods shipped from Ohio River points, there was a combination rate, equal to a rate made by adding to the competitive rate from the Ohio River to Montgomery, the full local rate from Montgomery to Troy.

3. On class goods shipped from New York, over the Alabama Midland Railway, there was a combination rate, equal to a rate

made by adding to the competitive rate from New York to Montgomery, *the full local rate from Montgomery back to Troy.*

4 I. C. Rep., p. 348, Board of Trade of Troy v. Alabama Midland Ry. Co.

69 Fed. Rep., p. 227, I. C. C. v. Alabama Midland Ry. Co.

74 Fed. Rep., 715, I. C. C. v. Alabama Midland Ry. Co.

168 U. S., p. 144, I. C. C. v. Alabama Midland Ry. Co.

It will be noticed that in the case of class goods shipped from New York over the Alabama Midland Railway, the combination rate was equal to a rate made by adding to the competitive rate, from New York to Montgomery, the full local rate *from Montgomery back to Troy*: just as in this case the combination rate is equal to a rate made by adding to the competitive rate from New Orleans to Atlanta, the local rate from Atlanta back to La Grange.

LIII.

The Combination Rates which Were Approved in the Georgia Railroad Commission Cases.

In what are known as the Georgia Railroad Commission cases, there were a number of combination rates which the Commission declared to be illegal, but which were approved by the Circuit Court, and by the Circuit Court of Appeals.

1. In one of those cases, there were combination rates equal to rates made by adding to the competitive rates from Cincinnati to Chattanooga, the full local rates from Chattanooga to certain local stations on the Western & Atlantic Railroad, between Chat-

tanooga and Atlanta; which combination rates were higher than the rates from Cincinnati to Atlanta.

2. In another of said cases, there were combination rates equal to rates made by adding to the competitive rates from New York, etc., to Atlanta, the full local rates from Atlanta to certain local stations on the Atlanta & West Point Railroad, between Atlanta and West Point. In the same case there were other combination rates equal to rates made by adding to the competitive rates from New York, etc., to Opelika, on the first six classes, the full local rates of the Western Railway of Alabama *from Opelika back to West Point.*

3. In another of said cases, there were combination rates equal to rates made by adding to the competitive rates from New York, etc , to Augusta, the full local rates of the Georgia Railroad from Augusta to certain stations on that railroad, between Augusta and Atlanta.

In the same case, there were other combination rates equal to rates made by adding to the competitive rates from New York, etc., to Atlanta, on classes 1, 2, 3, A and B, the full local rates of the Georgia Railroad *from Atlanta back to Covington.*

In the same case, there were other combination rates equal to rates made by adding to the competitive rates from New York, etc., to Atlanta, on classes 1, 2, 3, 4, A, B and H, the full local rates of the Georgia Railroad *from Atlanta back to Conyers.*

In the same case, there were other combination rates equal to rates made by adding to the competitive rates from New York, etc., to Atlanta, on all of the classes except C, D and F, the full local rates of the Georgia Railroad, *from Atlanta back to Stone Mountain.*

4 I. C. Rep., p. 120, Trammell et al. v. Clyde S. S. Co.
88 Fed. Rep., p. 186, I. C. C. v. W. & A. R. R. Co. et al.
93 Fed. Rep., p. 83, I. C. C. v. W. & A. R. R. Co. et al.

The decree of the Circuit Court of Appeals in that case was affirmed by this Court. The case being styled in this Court:

I. C. C. v. Clyde S. S. Co., 181 U. S. p. 29.

It will be noticed that in the case of West Point, Covington, Conyers, and Stone Mountain, the combination rates were equal to rates made by adding to the competitive rates from New York, etc., to Opelika, or to Atlanta, respectively, the full local rates of the Western Railway of Alabama from Opelika *back to West Point*, or the full local rates of the Georgia Railroad *from Atlanta back to Covington, Conyers and Stone Mountain*, just as in this case, the combination rates are equal to rates made by adding to the competitive rates from New Orleans to Atlanta, the local rates from Atlanta back to La Grange.

In the Georgia Railroad Commission cases, the Circuit Court of Appeals, in discussing the combination rates involved in those cases, said:

"Therefore, in fixing the rates to these intermediate points, the through rate to that competitive point, which combined with the local rate from the competitive point to the point of destination, will give the lowest through rate to the noncompetitive point, contro's. As the noncompetitive point thus gets the benefit of the lowest rate to any of the neighboring competitive points; and as the carriage of the competitive traffic to the respective competitive points is remunerating to the carriers to an extent that more than pays the expense of moving the competitive traffic, it is difficult to perceive how the noncompetitive points are subject to any undue or unreasonable prejudice or disadvantage by this scheme of rate making."

93 Fed. Rep., p. 92, I C. C. v. W. & A. R. R. Co. et al.

LIV.

The Combination Rates Which Were Approved in the Hampton Case.

In the case of I. C. C. v. N. C. & St. L. Ry. et al., known as the Hampton case, combination rates were approved by the Hon. James W. Locke, presiding in the Circuit Court of the United States for the Southern District of Florida. The combination rates were equal to rates made by adding to the competitive rates from St Louis, Nashville, or Chattanooga to Palatka, the local rates *from Palatka back to Hampton;* just as in this case the combination rates from New Orleans to La Grange are equal to rates made by adding to the competitive rates from New Orleans to Atlanta, the local rates from Atlanta back to La Grange. The case was decided by Judge Locke on the 16th day of April, 1902; but no written opinion was handed down.

LV.

The "Social Circle" Case Did Not Decide that Combination Rates Were Unreasonable.

In the Circuit Court, counsel for appellant referred to what is known as the "Social Circle Case," as holding that "combination rates" are unreasonable.

In the "Social Circle" case, it was held that where two or more roads join in making combination through rates on interstate traffic, such roads constitute but one "line;" and that such "line" is subject to the Act to Regulate Commerce, though one of the roads may be wholly within a single State. But it was not even intimated in that case, that a "combination rate" charged by such a line to a local station on one of the roads con-

stituting the line, is unreasonable, merely because the delivering road is allowed its local rate as its proportion of the joint through rate.

162 U. S., pp. 184, 191, 192, C. N. O. & T. P. Ry. v. I. C. C.

175 U. S., pp. 662, 672, 673, Louisville, etc., R. R. Co. v. Behlmer.

The "Social Circle" case was cited by counsel for the Commission in his argument in the Circuit Court of Appeals in the Georgia Railroad Commission cases, as holding that combination rates are unreasonable and unlawful. That Court decided the "Social Circle" case, and of course was familiar with what was held in that case; and that the Court did not consider the "Social Circle" case as holding that combination rates are unreasonable, is evident from its decision in the Georgia Railroad Commission cases.

LVI.

The "Augusta Southern" Case Did Not Decide that Combination Rates Are Unreasonable.

Counsel for appellant, in the Circuit Court, referred to the Augusta Southern Railroad case, 74 Fed. Rep., p. 527. The legality of "combination rates" was not discussed by the Court in that case. The Wrightsville & Tennille Railroad, which was one of the roads involved in that case, *was not the delivering carrier*. It was an intermediate carrier, and its service was, in the strictest sense, "through" service. It received the cars at one end of its line, and surrendered them at the other end; without incurring any of the expense or delay incident to delivery at local stations.

My information is that the rate discussed by the Court in that case was on phosphate from Charleston, via Augusta, and Tennille, to Oconee River landings.

The total rate was		$4 20
It was divided as follows:		
To the roads running from Charleston to Tennille, 326 miles (5½ mills per mile)	$1 80	
To the Wrightsville & Tennille Railroad, 36 miles (22 mills per mile)	80	
To the boats on the Oconee River	1 60	—$4 20
The proportion of the Wrightsville & Tennille Railroad, added to that of the boats, amounted to	2 40	

The Wrightsville & Tennille Railroad had for a long period of time joined with the Augusta Southern Railroad, as well as with the Central Railroad, in making through rates on phosphate; and it had accepted from each of them 80 cents as its reasonable proportion of the through rate.

Its local rate from Wrightsville to Tennille was $1.16. It withdrew from its connection with the Augusta Southern Railroad, and proposed to charge the Augusta Southern its local rate of $1.16, which, added to the boat's proportion of $1.60, made the total proportion from Tennille to the Oconee River landings $2.76, instead of $2.40, as it had previously been. The Court held that as $2.40 had been previously accepted from the Augusta Southern Railroad as reasonable, and as it was still accepted from the Central Railroad as reasonable, the presumption was that the increased rate of $2.76 was unreasonable as a charge against the Augusta Southern Railroad—especially as the former charge of $2.40 was continued to be accepted from the Central Railroad.

The question in that case was as to the right of a railroad to discriminate between two of its connections as to the proportion which it would demand out of a through rate. *There was no question as to whether the through rate was reasonable as between the through line as a shipper.*

In the case at bar, counsel contends that the Atlanta & West Point Railroad shall be compelled to accept substantially the same rate per ton per mile on the short haul, of 16 miles between West Point and La Grange, as competition forces the through line to accept on the long haul of 495 miles from New Orleans to Atlanta. But in the Augusta Southern case, the Court allowed the Wrightsville & Tennille Railroad to continue to charge its former rate of 80 cents for 36 miles, which rate was four times as much per ton per mile as was charged by the connecting roads from Charleston to Tennille; and the only effect of the order in that case was to prohibit the Wrightsville & Tennille Railroad from increasing its proportion from 80 cents to $1.16, as against the Augusta Southern Railroad, while it continued to accept 80 cents from the Central Railroad.

The "Augusta Southern" case was cited by counsel for the Commission, in his argument in the Circuit Court of Appeals in the Georgia Railroad Commission cases, as holding that combination rates are unreasonable and unlawful. Judge Pardee participated in the decision of the "Augusta Southern" case, and, of course, was familiar with what was held in that case; and that he did not consider the "Augusta Southern" case as holding that combination rates are unreasonable, is evident from his concurring in the opinion of the Circuit Court of Appeals in the Georgia Railroad Commission cases.

LVII.

The "Behlmer" Case is Not an Authority Against the Reasonableness of Combination Rates.

Counsel for appellant, in the Circuit Court, referred to the opinion of the majority of the Fourth Circuit Court of Appeals in the case of Behlmer v. Louisville & Nashville Railroad Company et al., 83 Fed. Rep., 898.

The case was decided in the Court of Appeals by a divided court. It was taken thence to this Court, where it was reversed.

175 U. S. 648, Louisville, etc., R. R. Co. v. Behlmer.

LVIII.

"Basing Points" or "Trade Centers" in the South.

Counsel for appellant, in the Circuit Court, made a vigorous attack upon what he calls the "trade center" or "basing point" system of rate-making, which has been used in the Southern States for many years. Counsel quoted the following description of the system as given by Commissioner Walker:

"Certain large cities and towns situated on the coast, at interior river points, and at railroad junctions, are *called* competitive, and receive quite low rates on all interstate traffic; all other stations are *called* local, and are charged much higher rates. The rates to local points are made by adding to the competitive rates at the nearest competitive point the local rate from that point."

1 I. C. Rep , p. 631, Harwell v. C. & W. R. R.

It will be noticed that Mr. Walker says that basing points are "*called*" competitive, as if they were so designated as a matter of preference or favor; and that he speaks of them as "*receiving*" quite low rates, as though such rates were given to them by the carriers as a matter of favoritism or partiality.

Judge Cooley was quoted by counsel in the Circuit Court as saying that the pre-eminence of such trade centers in the Southern territory "is peculiar, and has probably been increased by the *concessions* in rates which the railroads have made to them, while making less *concessions* or none at all to less important stations." . . . "The prevalence of such ideas, and the acting upon them in making freight tariffs, gives to railroad managers a power of determining within certain limits what towns shall be trade centers, and what their relative advantages."

1 I. C. Rep., p. 278, In Re Southern Ry. & Steamship Ass'n.

There may be a few mere "railroad junctions" which, owing to the ignorance or corruption of certain railroad officials, have been arbitrarily "called" competitive points, and which "receive" certain arbitrary "concessions" in rates. There may also be a few strictly local stations, which are not even "railroad junctions," where arbitrary and unfair "concessions" in rates have been made, by certain corrupt railroad officials, to enhance the value of property owned at such stations by said officials, or by their relatives or friends.

All such arbitrarily created so called "trade centers," or "basing points," if any such exist, are the offspring of ignorance or corruption, and justly deserve all that the Commission has said in denunciation of them.

The error of the Commission consists in failing to distinguish

between those "trade centers," or "basing points," which may have been arbitrarily created by certain railroad officials, at certain local stations, or at certain railroad junctions, and those "trade centers," or "basing points," which are situated on the sea coast, or other navigable water course, or which, though situated in the interior, have by reason of their peculiar geographical situation, become points of intersection of numerous rival railroads, or which, though situated at the intersection of only two railroads, have become competitive points by reason of certain exceptional conditions which happen to exist at those points, and which are not to be found at the ordinary local stations, or even at ordinary "railroad junctions."

Norfolk, Richmond, Wilmington, Charleston, Port Royal, Savannah, Brunswick, Augusta, Macon, Mobile, Montgomery, Columbus, Eufaula, etc, are illustrations of "trade centers," or "basing points," which are situated on the sea coast, or other navigable water course.

Competition between numerous water craft enabled them to command exceptionally low rates of transportation, long before a mile of railroad existed on the face of the earth. It is manifestly erroneous to say that they have been arbitrarily favored, with exceptionally low rates, by the ignorance or corruption of railroad officials. Their rates were always very much lower than those of adjacent interior towns.

When railroads were first constructed to those "trade centers," or "basing points," they found them in the enjoyment of exceptionally low rates, as compared with adjacent interior towns; and they simply recognized the rate situation as they found it.

It was impossible for the railroad officials to have increased the rates to those "trade centers," or "basing points;" because

the same water craft that had reduced the rates in the first instance would have reduced them again, if the railroad officials had attempted to increase them.

Before any railroads were built in Georgia, traffic from New York and other North Atlantic ports, as well as traffic from New Orleans and other Western points, was shipped by water to Charleston, Savannah, and Augusta.

Certain competitive through rates were charged by the ships and boats from New York and other North Atlantic ports, or from New Orleans and other Western points, to Charleston, Savannah, and Augusta; and from those "trade centers," or "basing points," the goods were hauled by wagons to interior towns in Georgia, such as La Grange.

Charleston, Savannah, and Augusta were important "trade centers" in those early days, and their prominence over interior towns, such as La Grange, was far greater then than now. La Grange was then, as now, a local, noncompetitive point.

The rates from New York and other North Atlantic ports, and from New Orleans and other Western points, to La Grange, were then, as now, "based" on the through competitive rates from New York and other North Atlantic ports, or from New Orleans and other Western points, to some "basing point" or "trade center" in South Carolina or Georgia, to which were added wagon rates from those "trade centers," or "basing points," to La Grange.

We see, therefore, that Charleston, Savannah, and Augusta, are natural "basing points" for making rates to La Grange; because they are the nearest natural "trade centers" to that point.

We see, also, that Charleston, Savannah, and Augusta are "basing points," or "trade centers," because they are situated on navigable water courses, and in the midst of large and fertile territories which are dependent upon them for commercial facilities; and not because of railroad favoritism.

It may be contended by counsel for the appellant that the interior towns, such as La Grange, are entitled to participate in the benefit which has resulted from the construction of railroads; and that they ought not to be remitted to the condition which existed in the days of ox-carts and wagons. I agree that the interior towns are as much entitled as those which are situated upon water courses to participate in the benefit which has resulted from the construction of the railway system; but I contend that they have been benefited by that system; and even more, in proportion, than the cities situated upon water courses. Instead of paying the high rates formerly charged by wagons, they now have a very much better and more expeditious service by railway. The rates charged by railways are not only much less than those formerly charged by wagons, but, in Georgia, they are regulated by the Georgia Railroad Commission, which is organized under a law which requires that the commissioners shall not "in any way, be the holders of any railroad stocks or bonds, or be the agent or employe of any railroad company, or have any interest in any way in any railroad."

The interior towns, such as La Grange, are not content, however, with having the benefit of all the competition that exists at the "basing points," or "trade centers," with the addition of only such local railroad rates as the Georgia Railroad Commission may fix as reasonable; but they insist upon having *precisely* the same rates as if they were located *exactly* where the "basing points," or "trade centers," are located.

There are in the South, a few "basing points," or "trade

centers," which are not situated on the sea coast, or other navigable water course, and which have become competitive points by reason of their peculiar geographical location, which has caused them to be made points of intersection of numerous rival railroads. Atlanta and Birmingham are illustrations of this class of "basing points," or "trade centers."

It is, of course, impossible to explain why large cities should have grown up at the exact points where Atlanta, and Birmingham, are located, instead of at points 50 or 100 miles distant from them. It is also impossible to explain why so many railroads have been constructed to Atlanta, and Birmingham, instead of being constructed to other points, which, to all appearances, would have presented as many advantages as are offered by Atlanta, or Birmingham. But the fact is, as we all know, that those two cities have become points of intersection of numerous rival railroads; and that those railroads, in their strife to share in the transportation of the large traffic of those cities, have reduced the rates to and from them, until the rates are almost as low as those which obtain to and from cities located upon navigable water courses.

It may be argued that it was wrong for so many railroads to congregate anywhere; and especially wrong to congregate at Atlanta, or Birmingham; or it may be argued that having congregated at Atlanta and Birmingham, the railroads ought to have kept the peace toward each other, and ought not to have indulged in those competitive rate wars which have so reduced the transportation charges at those points.

It is, in effect, contended by counsel for appellant that the prominence which has been obtained by Atlanta, and Birmingham, is due alone to railroad favoritism; and that if they had been treated like they should have been, they would today be like other railway stations in their vicinity. But Atlanta and

Birmingham were as prominent when the Act to Regulate Commerce was passed as they are now; and the question for this Court to decide is whether Congress intended by that act to deprive such places as Atlanta, and Birmingham, of their positions, and reduce them to the rank of mere local stations.

I submit that Congress never intended to interfere with the commercial advantages possessed by any city; whether those advantages were due to natural causes, such as location upon a water course, or to artificial causes, such as the aggregation of capital, the exhibition of business enterprise and sagacity; or even the accident of being selected as the point of intersection of numerous railways.

Congress does not require equality of rates in any case except where there is a similarity of circumstances and conditions. If the circumstances and conditions be substantially dissimilar, it is not the intention of Congress to inquire how the dissimilarity may have originally been created.

There is in commerce, as in politics, such a thing as the "status quo;" and we might as well question the right of the United States to Porto Rico, or the Philippines, as to question, at this day, the right of such places as Atlanta, and Birmingham, to the commercial prominence which they now possess; and which they have possessed for many years.

Opelika is not situated upon any water course, and it is the intersection of only two railways; but is affected by certain exceptional conditions which happen to exist at that point, and which are not to be found at ordinary local stations, or even at ordinary railroad junctions.

Mr. Lutz explains how it happened that Opelika takes substantially the same rates as Atlanta. He says:

"Until 1888, the rates to Opelika from all points were made of (by) combination either on Columbus or Montgomery. About the time the Interstate Commission Law went into effect, the Central of Georgia Railway and the Ocean Steamship companies being under one management and control, and leading direct from the eastern ports to Opelika controlled the making of rates from the east to that point, (and) decided that under the Interstate Commerce Law, the rates from the east to Opelika, should not be higher than to Birmingham, Alabama, (and) put such rates into effect. The Central of Georgia Railway also took the position that they could not charge higher rates from the west to Opelika, Ala., than were charged to Columbus, Georgia, (and) adopted and put into effect rates to Opelika the same as to Columbus."

. . . . . .

"The Atlanta & West Point Railroad and Western Railway of Alabama were forced by reason of these rates being put into effect by the Central of Georgia Railway, to meet the rates as made by the Central of Georgia Railway, or retire from the business."

Trans., p. 359.

The legality of Opelika, as a "basing point," or "trade center," was involved in one of the Georgia Railroad Commission cases referred to above, and upon that point, the Circuit Court of Appeals said:

"The Commission's report says that the present adjustment of rates to Atlanta is the outcome of severe competition between lines leading from the competing markets, like St. Louis, Baltimore, Cincinnati, etc., and, with some modifications occurring from time to time, has been in effect for a considerable period. While it makes no similar finding with reference to Opelika showing whether or not the adjustment of rates to that point is

the outcome of severe competition, either between carrier and carrier, or between market and market, its recitals of what the proof shows as to conditions there are to that effect, and the testimony of numerous credible witnesses is clear and pointed to the effect that the adjustment of rates to Opelika is the outcome of controlling competition."

93 Fed. Rep., p. 87, I. C. C. v. W. & A. R. R. Co. et al.

Again that Court said:

"The testimony of the witnesses and the report of the Commission show that Opelika is not situated on any water course, and is at the intersection of only two railways, but that it is affected by certain conditions which happen to exist at that point and which are not to be found at ordinary local stations or even at ordinary junctions. With its two railroads as terminal carriers, it is connected at comparatively short distances with numerous and extensive systems of rail and water carriage, which make it possible for freight to reach Opelika from the Northern and Eastern ports, and from Ohio river points by many different routes, the strong competition between which different carriers comes to a focus at Opelika."

93 Fed. Rep., p. 89, I. C. C. v. W. & A. R. R. Co. et al.

LIX.

"Basing Points" or "Trade Centers" in the North and West.

"Basing points," or "trade centers," are not confined to the South. Freight tariffs covering the traffic from the Eastern seaboard territory to Western points were, for many years, established under the rules and regulations of the associations then known as the Trunk Line, and Central Traffic associations. Un-

der agreements of several years' standing, it had been the custom of roads, forming by connections through lines from the seaboard to the West, to determine through rates from New York to Chicago, "and to adopt such rates as *the standard or basis* for the construction of tariffs from other Eastern cities, and points adjacent thereto, which are directly or indirectly in competition for Western business."

"For twenty years or more the rates from Boston to Western competitive points have been the same as from New York From Philadelphia and Baltimore, the rates are "agreed differentials"—less than New York—the Baltimore rates being also lower than Philadelphia rates."

The agreed rates and distances from New York to Chicago are taken as the standard, or 100 per cent. Through rates to the principal Western cities, towns and junction points in the territory above described, are computed at a percentage of the New York-Chicago rates, based generally on the relative mileage of such points to the Chicago mileage. For example, rates from New York to Indianapolis, Ind., are 93 per cent of the New York-Chicago rates; Cincinnati, O., 87 per cent; Columbus, O., 77 per cent; St. Louis, Mo., 116 per cent, etc. Thus the New York-Chicago rates being at all times applied as the basis, would, when changed, create relative changes in the rates to other Western points. In a similar manner the relation as to rates is maintained from the other Eastern cities. When the rates from New York to Western points are changed, like changes are made from Boston, Philadelphia, and Baltimore, and points receiving the same rates; the "differentials" as between the Eastern cities being at all times maintained.

Wholesale Prices, Wages and Transportation, Senate Rep., No. 1394, 2d Sess. 52 Con , Part I., pp. 429, 430.

And so with reference to through rates from Kansas and Ne-

braska points to the seaboard. "The through rates to the Eastern seaboard are generally made on the combination of the rates east and west of the Mississippi River."

Wholesale Prices, Wages and Transportation, Senate Rep., No. 1394, 2d Sess. 52 Con., Part I., p. 552.

The rates and distance from New York to Chicago are taken as the base in the territory between those cities, because of the water competition from Chicago to New York via the Lakes, the Erie Canal and the Hudson River; and that line of water transportation is the only practical water line between the northeastern sea coast and the Mississippi River. But the Southern territory is surrounded on the east and south by the Atlantic Ocean and the Gulf of Mexico; and on the west and north by the Mississippi and Ohio Rivers. *It is also penetrated by numerous rivers navigable by steamboats from the ocean for considerable distances into the interior.*

It is therefore impossible to adopt in the South any one set of rates, or any particular distance, as a standard for making rates for that entire territory. To illustrate: If it were attempted to take the distance, and the rates, from New York to New Orleans, as a standard or basis, and to fix the rates from New York to Norfolk, or from New York to Charleston, or from New York to Savannah, etc., as certain per cents of the rate from New York to New Orleans, such percentage rates could not be maintained like similar percentage rates are maintained between certain cities in the Trunk Line territory; because they would be cut, in almost every instance, either by the all-water lines, or by the rail and water lines.

That peculiar difficulties surround the rate situation in the South is conceded by the Commission, itself, in the following language:

"A study of the conditions under which railroad traffic in certain sections of the country has sprung up is necessary to an understanding of the difficulties which surround the subject. The territory bounded by the Ohio and Potomac on the north, and by the Mississippi on the west, presented to the Commission an opportunity, and also an occasion, for such a study. *The railroad business of that section has grown to be what it is in sharp competition with water carriers, who not only have had the ocean at their service, but by means of navigable streams were able to penetrate the interior in all directions.*"

First Annual Report Interstate Commission (1887), p. 16.

The only possible way by which the basing system employed in the Trunk Line territory could be made applicable in the Southern territory, would be to subject all carriers by water to the Act to Regulate Commerce, and to establish, by legislative enactment or otherwise, certain relative maximum *and minimum* rates to and from all of the principal points in the South; and then require all carriers, whether by rail, or by water, to maintain the rates so fixed.

LX.

The Second Section of the Act to Regulate Commerce Has No Application to This Case.

The second section of the Act to Regulate Commerce is:

"That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property subject to the provisions of this act, than it

charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

24 U. S. Stat. at Large, pp. 379, 380.

The second section was construed by this Court, in Wight v. U. S., 167 U. S., pp. 516, 518. In that case, a railroad company charged one shipper a higher rate than another shipper for the carriage of beer from the same place of shipment (Cincinnati) to the same destination (Pittsburg). The Court held that the phrase "under substantially similar circumstances and conditions," *as used in the second section*, refers to the matter of carriage, and does not include competition. The Court said that it was the purpose of *the second section* to enforce equality between shippers, and to prohibit "any rebate or other device by which two shippers, shipping over the same line, *the same distance*, under the same circumstances of carriage, are compelled to pay different prices therefor."

In other words, this Court construed the second section of our act as being the equivalent of what is known as the English "Equality Clause;" which is a clause of Section 90 of the English "Railway Clauses Act, 1845."

The English "Equality Clause" requires equality of charge in no case except where goods pass "*only* over the same portion of the line of railway under the same circumstances."

2 Ann. Rep., I. C. C. (1888), p. 89.

The English "Equality Clause" has no application where freight of one shipper, though carried over the same line, is carried a greater distance from a common point of departure than

the freight of another shipper. In such a case, the freight carried the greater distance would pass "over the same portion of the line" as the freight carried the lesser distance; but the freight carried the greater distance would also pass over an *additional* portion of the line; and, therefore, the two shipments would not pass "*only* over the same portion of the line."

Law Rep., 21 Q B. (1888), pp. 217, 218, L. & Y. Ry. Co. v. Greenwood.

It is evident that where goods pass "*only* over the same portion of the line," or between the *same* points of departure and arrival," there cannot be any substantial dissimilarity of circumstances and conditions, *so far as competition is concerned*. Because, whatever competition may exist on that portion of the line, affects all shippers equally. And if, by reason of such competition, a railroad company sees proper to accept certain rates from one shipper, it must, by the express terms of the "Equality Clause," accept the same rates from any other shipper, in respect of all goods of the same description, passing between the same points of departure and arrival.

The English "Equality Clause" did not apply either where the points of departure were different; or where the points of arrival were different; or where the distances over which the goods were carried were different.

Law Rep., 21 Q. B. (1888), pp. 217, 218, L. & Y. Ry. Co. v. Greenwood.

And so, this Court held that the *second section* of our act applies only where two or more shippers ship "over the same line, *the same distance*, under the same circumstances of carriage."

In the case at bar, goods destined to La Grange do not pass over the "same distance" as goods shipped to the longer distance points.

LXI.

The Third Section of the Act to Regulate Commerce Prohibits Only Such Preferences as Are Unjust or Unreasonable.

The third section of the Act to Regulate Commerce was modeled upon the second section of the English Railway and Canal Traffic Act of 1854, and upon Section 11 of the English Railway and Canal Traffic Act of 1873. For the convenience of the Court, I print in parallel columns so much of said sections as are material for the purpose:

UNDUE PREFERENCE CLAUSE	UNDUE PREFERENCE CLAUSE.
English Act.	*American Act.*
Sec. 2. Railway and Canal Traffic Act, 1854.—1 *Nev & Mac., p.* 2.	Sec. 3. Act to Regulate Commerce.
Sec. 11. Railway and Canal Traffic Act, 1873.—1 *Nev & Mac., p.* 11.	That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any *undue* or *unreasonable* preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any *undue* or *unreasonable* prejudice or disadvantage in any respect whatsoever.—24 *U. S. Stat at Large, p.* 380.
. . . . And no such company shall make or give any *undue* or *unreasonable* preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any *undue* or *unreasonable* prejudice or disadvantage in any respect whatsoever.—1 *Nev. & Mac., pp.* 2–11.	

In the case of Interstate Commerce Commission v. Baltimore & Ohio Railroad Co., Mr. Justice Brown, speaking for this Court, said:

"It is not all discriminations and preferences that fall within the inhibition of the statute; *only such as are unjust or unreasonable*" . . . "Indeed, the possibility of just discriminations and reasonable preferences is recognized by these sections, in declaring what shall be deemed unjust."

145 U. S., pp. 276, 277, I. C. C. v. B. & O. R. R.

In the case of Interstate Commerce Commission v. Alabama Midland Railway Co., Judge Bruce said:

"The words 'any undue or unreasonable preference or advantage' plainly imply that every preference or advantage is not condemned, *but such, only, as are undue or unreasonable.*"

69 Fed. Rep., pp. 231, 232.

In the case of the Commercial Club of Omaha v. Chicago & N. R. Co., decided November 18, 1897, the Commission, speaking through Commissioner Knapp, said:

"It must be remembered that not every inequality in rates constitutes a violation of the law. *Discrimination is forbidden only when it is unjust. Preferences and prejudices are not prohibited unless they are undue.* The language of the statute implies that there may be discriminations which are not unjust and preferences which are not undue."

7 I. C. Rep., p. 404.

It goes without saying that where lower rates are charged to one city than to another, and those cities are competitors in a common territory, such disparity of rates constitutes a preference in favor of the one, and a prejudice or discrimination as against the other.

But the question still remains whether the preference, or prejudice, or discrimination, is *undue or unjust.*

DIAGRAM B.

In the above diagram, suppose A-C to represent a railroad owned by one company, and A-B to represent a railroad owned by a different company. Suppose B and C are cities which compete in the territory which lies between them. If the company owning the railroad A-C puts in a line of rates on traffic from A to C materially lower than the company owning the other railroad charges on traffic from A to B, such a disparity of rates will constitute a preference in favor of C and a prejudice or discrimination against B; because it will enable C to compete at an advantage over B in the territory which lies between them. But such preference or prejudice is not *undue or unjust.* Merchants at B would have no ground of complaint against the line A-C, because it carries no traffic to or from B.

4 I. C. Rep., p. 65, Eau Claire Board of Trade v. C. M. & St. P. Ry. et al., 4th head note.

Nor would merchants at B have any complaint against the line A-B; because the reduction in rates on traffic from A to C, which alone created the disparity of rates, was not made by the line A-B, but by the line A-C, over which the line A-B has no control. Even if the same company owned both lines, the mere fact that it made a material reduction in the rates on traffic from

A to C, would not, of itself, establish the fact that the preference in favor of C was *undue*, or that the prejudice or discrimination against B was *unjust*. The competition existing at C might compel the company to accept on traffic from A to C, rates much lower than it otherwise might reasonably charge.

LXII.

Under the Third Section of the Act to Regulate Commerce a Common Carrier is not Made Responsible for Any Undue Preference, Unless it be Created by the Carrier's Act.

The third section provides "that it shall be unlawful for any common carrier subject to the provisions of this act *to make or give* any undue or unreasonable preference or advantage," etc.

Even though a preference be undue, or unreasonable, unless it be one which *the common carrier has* "*made or given*," such carrier is not responsible for it.

Such preference as may exist in this case in favor of Atlanta, Fairburn, Palmetto, Newnan, or Hogansville, existed before any of the appellees' railroads were constructed, and therefore it is not one which *they* have "*made or given*."

Mr. Calloway, who filed the petition before the Commission, in this case, testifies that his information is that before railroads were built, merchants at La Grange did not trade at New Orleans; but traded at Charleston.

Trans., p. 84.

Of course, before railroads were built, freight had to be hauled by wagon from Charleston to La Grange; and as Atlanta, Fair-

burn, Palmetto, Newnan, and Hogansville were nearer than La Grange to Charleston, they naturally had lower wagon rates than La Grange upon all freight purchased by them.

The South Carolina Railroad was completed from Charleston to Augusta in 1833.

See Poor's Manual for 1890, p. 723.

The Georgia Railroad, extending from Augusta to Atlanta, was completed in 1845.

See Poor's Manual for 1888, p. 589.

The Atlanta & La Grange Railroad, extending from Atlanta to La Grange, and which is now known as the Atlanta & West Point Railroad, was opened from Atlanta to West Point, May 15, 1854.

See Poor's Manual for 1890, p. 346.

After the South Carolina Railroad was completed from Charleston to Augusta in 1833, freight was doubtless carried from Charleston to Augusta by rail, and thence hauled by wagon to Atlanta, Fairburn, Palmetto, Newnan, Hogansville, and La Grange.

After the Georgia Railroad was completed from Augusta to Atlanta in 1845, freight was doubtless carried from Charleston by rail to Atlanta, and thence hauled by wagon to Fairburn, Palmetto, Newnan, Hogansville, and La Grange.

It is morally certain that up to 1854, when the Atlanta & West Point Railroad was completed from Atlanta to La Grange, La Grange had always paid higher rates upon all of her freight than were paid by Atlanta, Fairburn, Palmetto, Newnan, or Hogansville. The preference enjoyed by Atlanta, Fairburn, Palmetto, Newnan, and Hogansville, over La Grange, in the

matter of freight rates, is therefore one which was not created by the Atlanta & West Point Railroad, but was one which had always existed prior to the completion of that railroad. The appellees simply recognized a preference already existing; and the real ground of complaint in this case is, that the appellees did not reverse the condition of affairs, which was in existence, when the Atlanta & West Point Railroad reached La Grange; and that they did not take from Atlanta, Fairburn, Palmetto, Newnan, and Hogansville the preference which they then enjoyed, and give that preference to La Grange.

LXIII.

The Situation at La Grange After Appellees' Line was Completed from New Orleans.

As La Grange was nearer than Hogansville, Newnan, Palmetto, Fairburn, or Atlanta, to New Orleans, she would have had lower rates than any of those cities from New Orleans, if distance alone could have controlled.

As before stated, railroads not only recognize, but insist, that distance shall control, in the absence of competition. But where competition conflicts with distance, competition must control, or it must be abandoned. All competing lines, whatever may be their difference in length, must accept the lowest rates offered by either of them; or surrender the competitive traffic to the one that offers the lowest rates. If the lowest rates be offered by the shortest line, the longer lines must disregard the disadvantage of distance under which they labor; or if, as is frequently the case, the lowest rates be offered by the longest line, the shortest line must accept the rates, however much they may be below the rates which the shortest line might, but for the competition, have rea-

sonably charged. The competition at Atlanta has been such that it has been impossible for the appellees to construct their rates from New Orleans to La Grange, Hogansville, Newnan, Palmetto, Fairburn, and Atlanta according to distance. They were compelled to accept the competitive rates prevailing at Atlanta, or abandon the New Orleans-Atlanta traffic altogether. And the competitive rates at Atlanta have been so low, that even though they be increased by adding to them the local rates from Atlanta back to Fairburn, Palmetto, Newnan, and Hogansville (which local rates are fixed by the Georgia Railroad Commission and cannot be exceeded), they make the rates from New Orleans to Fairburn, Palmetto, Newnan, and Hogansville lower than they would have been, if distance could have controlled, and lower than the rates are from New Orleans to La Grange.

LXIV.

The Competition Which Exists at Atlanta is Entitled to the Same Consideration Under the Third Section, as it is Under the Fourth Section, of the Act to Regulate Commerce.

In the case of the Texas & Pacific Ry. v. I. C. C., 162 U. S., p. 232, this Court quotes approvingly the following statement made by Jackson, Circuit Judge, in the case of I. C. C. v. B. & O. R. R. Co., 43 Fed. Rep., p. 53:

"The English cases establish the rule that, *in passing upon the question of undue or unreasonable preference or disadvantage*, it is not only legitimate, but proper, to take into consideration, besides the mere difference in charges, various elements, such as the convenience of the public, the fair interests of the carrier, the relative quantities or volume of the traffic involved, the rela-

tive cost of the services and profit to the company, and the situation and circumstances of the respective customers with reference to each other as *competitive* or otherwise."

162 U. S, p. 232, Tex. & Pac. Ry. v. I. C. C.

In the same case this Court, in discussing the third section, says:

"In passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well as of the carrying companies as of the traders and shippers, *and in considering whether any particular locality is subjected to an undue preference or disadvantage*, the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment. That among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, *competition that affects rates should be considered*, and in deciding whether rates and charges made at a low rate to secure foreign freight which would otherwise go by other competitive routes are or are not *undue and unjust*, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered," etc

162 U. S., pp. 233, 234, Tex. & Pac. Ry. v. I. C. C.

175 U. S., p. 665, Louisville, etc., R. R. Co. v. Behlmer.

In the case of T. & P. Ry. Co. v. I. C. the "competitive" routes were either all water lines from Liverpool, via Cape Horn, to San Francisco; or water and rail lines from Liverpool, via the

Isthmus of Panama, to San Francisco; or water and rail lines from Liverpool to various Atlantic and Gulf ports in the United States, and thence to San Francisco. One of the questions argued in that case was, whether either of said "competitive routes" was "subject to the Act to Regulate Commerce;" and the Commission declined to recognize that case as deciding that competition between carriers which are "subject to the Act to Regulate Commerce" can be considered in determining whether a certain preference or advantage is undue or unjust. That question was definitely settled by this Court in the subsequent cases of the Interstate Commerce Commission v. Alabama Midland Ry. Co., 168 U. S., pp. 164, 167; and Louisville, etc., R. R. v. Behlmer, 167 U. S., pp. 666, 667, 668.

In the case of E. T. V. & G. Ry. Co. v. I. C. C., 181 U. S., pp. 18 and 19, this Court said:

"In a supposed case when, in the first instance, upon an issue as to a violation of the fourth section of the act, it is conceded or established that the rates charged to the shorter distance point are just and reasonable in and of themselves, and it is also shown that the lesser rate charged for the longer haul is not wholly unremunerative and has been forced upon the carriers by competition at the longer distance point, it must result that a discrimination springing alone from a disparity in rates cannot be held, in legal effect, to be the voluntary act of the defendant carriers, and as a consequence *the provisions of the third section of the act forbidding the making or giving of an undue or unreasonable preference or advantage will not apply.*

"*The prohibition of the third section*, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the *voluntary* and *wrongful* act of the carriers complained of as having given undue pref-

erence, and does not relate to acts *the result of conditions wholly beyond the control of such carriers.* To otherwise construe the statute would involve a departure from its plain language, and would be to confound cause with effect. For, if the preference occasioned in favor of a particular place by competition there gives rise to the right to charge the lesser rate to that point, it cannot be that the availing of this right is the cause of the preference, and especially is this made clear in the case supposed, since it is manifest that forbidding the carrier to meet the competition would not remove the discrimination.

"The only principle by which it is possible to enforce the whole statute is the construction adopted by the previous opinions of this Court; that is, that competition which is real and substantial and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition provided by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and noncompetitive place, and that this right is not destroyed by the mere fact that incidentally the lesser charge to the competitive point may seemingly give preference to that point, and the greater rate to the noncompetitive point may apparently engender a discrimination against it. We say seemingly on the one hand and apparently on the other, because in the supposed cases the preference is not 'undue' or the discrimination 'unjust.' This is clearly so, when it is considered that the lesser charge upon which both the assumption of preference and discrimination is predicated is sanctioned by the statute, which causes the competition to give rise to the right to make such lesser charge."

The italics are mine.

LXV.

While "Mere" Competition Does Not Authorize a Less Charge for a Longer than a Shorter Distance, the Reverse is True Where the Competition, Having Due Regard to the Interests of the Public and of the Carrier, Ought Justly to Have Effect Upon the Rates

Counsel for appellant, in the Circuit Court, referred to the following language used by this Court in the Alabama Midland Railway case, viz.:

"In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do not hold that the *mere* fact of competition, *no matter what its character or extent*, necessarily relieves the carrier from the restraints of the third and fourth sections," etc.

168 U. S., 167, I. C. C. v. Alabama Midland Ry. Co.

I do not contend "that the *mere* fact of competition, no matter what its character or extent," necessarily "relieves the carrier from the restraints of the third and fourth sections." My only contention is, that "competition *that materially and substantially affects rates* should be considered." And that proposition has been distinctly decided by this Court in the case of the Texas & Pacific Ry. v. I. C. C., 162 U. S., 233; in the case of I. C. C. v. Alabama Midland Ry. Co., 168 U. S., p. 166; in the case of Louisville, etc., R. R. v. Behlmer, 175 U. S., pp. 674, 675; and in the case of E. T. V. & G. R. R. v. I. C. C., 181 U. S., p. 1.

Counsel for appellant also referred to the following language used by this Court in the Alabama Midland Railway case, viz.:

"The competition may in some cases be such as, *having due regard to the interests of the public and of the carrier*, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the Commission or the courts from taking that matter into consideration."

168 U. S., p. 167.

I contend that the competition at Atlanta, "ought justly to have effect upon the rates," if we are to have due "regard to the interests of the public."

As said by this Court in 163 U. S., pp. 165-166; in 162 U. S., pp. 233-234, and in 175 U. S., p. 665, "the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment."

The "place of shipment" in this case, is New Orleans. "The communities occupying the localities where the goods are delivered" include the community at Atlanta, as well as the community at La Grange. The welfare of New Orleans, and the welfare of Atlanta, are to be considered as well as the welfare of La Grange. New Orleans is greatly benefited by the advantage which accrues to it from the competition afforded by the various competing lines, which extend from New Orleans to Atlanta; and the Commission itself finds and reports that "the lower rates from New Orleans to Atlanta with present adjusted charges from other sources have played an important part in the development of that city (Atlanta) including railway traffic thereto and therefrom," etc.

Trans., p. 44.

Atlanta is as much entitled to the advantage of the fact that it can avail itself of the competition which exists between the various competing lines, which extend from New Orleans to Atlanta, and of the competition which exists between those lines and other lines reaching Atlanta from other markets, as La Grange is entitled to avail itself of the advantage of the fact that it is (by appellees' line) nearer to New Orleans than Atlanta is.

Phipps v. L. & N. W. Ry. Co., Law Rep. (1892), 2 Q. B., 329, *et seq.*

The Phipps case was cited approvingly by this Court in 162 U. S., p. 224, T. & P. Ry. v. I. C. C.; and in 168 U. S., p. 164, I. C. C. v. Alabama Midland Railway Company et al.

I also contend that the competition at Atlanta "ought justly to have effect upon the rates," if we are to have due "regard to the interests" of the appellee carriers.

The rates from New Orleans to Atlanta yield the carriers a small margin of profit over the additional cost of the movement of that traffic.

Trans., p. 107.

It is, therefore, to the fair interests of the appellees to be allowed to earn that margin of profit, however small it may be. It is by making small "margins of profits," on large volumes of low-rate traffic, shipped between competitive points, that much of the revenue of railroad companies in this country is earned.

So long as there is any "margin of profit" at all, the appellees sustain no loss in the carriage of traffic from New Orleans to Atlanta; and therefore they are under no temptation to increase the rates to La Grange, or other shorter distance points, to

recoup against loss. In other words, to paraphrase the language of this Court, "having due regard to the interests of the public, as well as of the appellee carriers, the competition at Atlanta ought justly to have effect upon the rates;" and the Commission ought, in this case, to have allowed the appellee carriers to take that competition into consideration, notwithstanding it was competition between carriers *confessedly amenable to the Act to Regulate Commerce.*

It is only "where the carrier cannot meet the competitive rate to a given point without transporting the merchandise *at less than the cost of transportation*, and therefore without bringing about a *deficiency*, which would have to be met by increased charges upon other business," that competition becomes illegitimate. And it becomes so in that case, because "the engaging in such competitive traffic would both bring about an unjust discrimination, and a disregard of the public interest, since a tendency towards unreasonable rates on other business would arise from the carriage of traffic at less than the cost of transportation to particular places. But no condition of this character is here in question."

181 U. S., p. 20, E. T. V. &. G. Ry. Co. v. I. C. C.

LXVI.

The Mere Fact that There is a Material Disparity Between the Rates to La Grange, and the Rates to the Longer Distance Points, Does Not, of Itself, Constitute an Undue Preference, or an Unjust Discrimination.

In the case of the Texas & Pacific Railway v. Interstate Commerce Commission, 162 U. S., pp. 219, 220, this Court says:

"*The mere circumstance that there is, in a given case, a preference or an advantage, does not of itself show that such preference or advantage is undue or unreasonable* within the meaning of the act. Hence it follows that before the Commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts; and here again we think it evident that those facts and matters which carriers, apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its judgment whether such preference or advantage is undue or unreasonable."

In the same case, on page 239, this Court says:

"*The mere fact that the disparity between the through and the local rates was considerable did not, of itself, warrant the Court in finding that such disparity constituted an undue discrimination*—much less did it justify the Court in finding that the entire difference between the two rates was undue or unreasonable, especially as there was no person, firm or corporation complaining that he or they had been aggrieved by such disparity."

In the case of the Savannah Bureau of Freight & Transportation v. the Charleston & Savannah Ry. Co., 7 I. C. Rep., p. 480, the Commission, having decided that certain shorter distance rates involved in that case were not a violation of the fourth section, says:

"Whether those rates are in violation of the third section, in that they give an undue preference to the more distant point, is a different question which might arise in cases of this kind. It is incidentally raised by the allegations in this complaint, but was not relied upon on the trial. *There is nothing in the case which bears upon it except the mere fact that the rate to the intermediate point is higher.* Under these circumstances we have not considered the question as fairly before us, and do not pass upon it in disposing of the case."

And so in the case at the bar, as in those cases, there is nothing which bears upon the question of undue preference "*except the mere fact that the rate to the intermediate point is higher.*"

Under the authority of the case of the Texas & Pacific Railway v. I. C. C., as well as under authority of the case of the Savannah Bureau of Freight and Transportation v. Charleston & Savannah Railway Co., cited above, I contend that there is no sufficient evidence in the record in this case to justify this Court in declaring that the mere disparity in rates between La Grange and the longer distance points, constitutes an undue preference in favor of the latter, or an undue prejudice against the former.

In the case at bar, this Court is asked by counsel for the appellant to do precisely what the Commission refused to do in the case of the Savannah Bureau of Freight & Transportation v. Charleston & Savannah Railway Co., viz.: to declare that the

appellees have given undue preference to the longer distance points, when there is nothing in the case which bears upon that question, except the mere fact that the rates to La Grange are higher. This Court is asked to do the very thing for which this Court reversed the Court of Appeals in the case of Texas & Pacific Railway v. Interstate Commerce Commission, viz.: to declare that the mere fact that the disparity between competitive and local rates is considerable, warrants the Court in finding that such disparity constitutes an "undue discrimination." It is certain that this Court has no more material evidence before it in this case, than the Commission had before it in the case of the Savannah Bureau of Freight & Transportation v. Charleston & Savannah Railway Co., or the Court of Appeals had before it in the case of the Texas & Pacific Railway Co. v. I. C. C., upon which to predicate a decree that the rates in controversy are violative of the third section.

LXVII.

The Present Differences Between La Grange's Rates and the Rates to the Longer Distance Points is Justifiable.

Counsel for appellant, in the Circuit Court, placed stress upon the following language used by Judge Severens at Circuit, in the case of I. C. C. v. E. T. V. & G. Ry. Co. et al., 85 Fed. Rep., 118:

"In other words, my opinion is that the restraint of Section 4 is to be applied upon *the scale of comparison between the dissimilarity of conditions and the disparity of rates*, and that it is competent under *that* section to restrain the exaction of the

greater charge for the shorter haul, although there may be a substantial dissimilarity of condition, *provided the dissimilarity is not so great as to justify the discrimination made.*"

It is one thing to suggest a theoretical proposition and quite another thing to formulate a practical rule.

In the enforcement of the Act to Regulate Commerce, the courts will necessarily be compelled to formulate certain rules for rate-making, to be followed by the railroad traffic managers of the country. The subject of rate-making is an eminently practical subject; and such rules as the courts may formulate must be such as can be practically applied to the commerce of the country, or they will be useless, if not injurious. With the utmost respect for Judge Severens, I submit that there is no theoretical mathematician who can understand what Judge Severens means by the phrase, "the scale of comparison between the dissimilarity of conditions and the disparity of rates;" and I also submit that there is no practical railroad traffic manager who can make out a tariff or schedule of rates, upon any such "scale of comparison," as Judge Severens suggests.

The opinion of Judge Severens was reviewed and reversed by this Court, in the case of E. T. V. & G. Ry. v. I. C. C., 181 U. S., p. 21, *et seq.;* and this Court after quoting the above extracts from his opinion said:

"But this reasoning, whilst it does not apparently wholly rest on the erroneous view which we have previously refuted, in substance but applies to it. Indeed, it not only does this but it more markedly destroys one provision of the statute by the other, since it in effect declares that the greater the competition at any given point the lesser power has this fact to produce the

dissimilarity of circumstance and condition provided in the statute. That such is the conclusion to which the reasoning resolves itself must be the case, when it is considered that the more active competition is at a particular point the lesser the rate will be to that point, and the greater, therefore, the disparity between the charge to the competitive point than that made to the noncompetitive one. The proposition then is this, that the greater and more potential is the influence of competition on rates and traffic, the less will be its force to engender dissimilarity of circumstance and condition; that is to say, that the causes specified in the statute are to be allowed to produce their influence in inverse ratio to their strength and importance."

181 U. S. pp. 21, 22, 23, E. T. V. & G. Ry. Co. v. I. C. C.

LXVIII.

Judge Severens' Error in Construing My Argument as Contending that the Extent of the Discrimination Must be Confided to the Judgment of Railroad Officials.

Counsel for appellant, in the Circuit Court, quoted the following from the opinion of Judge Severens in the case of I. C. C. v. E. T. V. & G. Ry. Co., 85 Fed. Rep., p. 117:

"The argument of counsel for the carriers is in effect that the extent of the discrimination must be confided to the judgment of the railroad officials, whose ability and experience best qualify them for the task. If this be so, there is nothing for the Commission or the Court to do, but to take notice of the fact that the conditions are dissimilar, and abandon all further in-

quiry. It is fundamental that no such proposition as this can be admitted."

His Honor misapprehended my argument in that case. I have never claimed that "the extent of the discrimination" must be confided to the judgment of railroad officials; nor have I ever denied the right of either the Commission, or the Court, to review the judgment of railroad officials, on that question, or on any other question.

My argument in that case was, as it is in this case, that where the existence of competition at a longer distance point is such as to create a material and substantial dissimilarity between the circumstances and conditions which exist at that point, and those which exist at a shorter distance point, neither railroad officials, nor commissions, nor courts, can determine "the extent of the discrimination" by any such "scale of comparison between the dissimilarity of conditions and the disparity of rates" as was suggested by Judge Severens in that case.

My contention was, and is, that "*the extent* of the discrimination" *determines itself.*

If the rates to the shorter distance point (La Grange) be reasonable within the purview of the first section; if competition which is real and substantial, and exercises a potential influence on rates, forces lower rates to the longer distance point (Atlanta); if there be no discrimination against La Grange except such as springs alone from a disparity in rates; there is but one question submitted either to the carrier, the Commission or the Court, and that is whether it will subserve the public's interest,

as well as the carrier's interest, for the carrier to compete at the longer distance point (Atlanta).

175 U. S., pp. 674, 675, L. & N. R. R. Co. v. Behlmer.
181 U. S., pp. 18, 19, 20, E. T. V. & G. Ry. Co. v. I. C. C.

The decision of that question by a carrier may be reviewed either by the Commission, or the Court. But if the Commission, or the Court, agrees with the carrier that it will subserve the public interest, as well as the interest of the carrier, for the carrier to compete at the longer distance point (Atlanta), then "the extent of the discrimination" *will determine itself;* and it will amount, as in this case, to exactly the difference between the present reasonable rates charged to the shorter distance point (La Grange), and the present lower rates forced by competition at the longer distance point (Atlanta). In such a case, "*the extent* of the discrimination," whatever it may happen to be, cannot, in legal contemplation, be deemed *unjust* or *unreasonable;* and no discrimination is forbidden by the Interstate Commerce Act unless it be *unjust* and *unreasonable.*

LXIX.

The Limitations which May Reasonably be Imposed Upon Carriers in the Exercise of Their Privilege of Taking into Consideration Competition as One of the Circumstances and Conditions Affecting Transportation.

I concede that carriers, in exercising the privilege of taking into consideration competition as one of the circumstances and conditions affecting transportation, must act within "reasonable limits."

In the case at bar, I suggest that the "reasonable limits" imposed upon the exercise of said privilege are three; and all of them are eminently practical.

First: The rates charged by the appellees to the noncompetitive point, La Grange, must not be unjust or unreasonable, within the purview of the first section of the act.

Second: The competition at Atlanta must be such as subserves the public interest, as well as the carrier's interest. It must also be real, and substantial; and such as to compel the acceptance by the appellees of the rates that are accepted by them at that point.

Third: The rates accepted by the appellees on traffic to Atlanta must yield some profit (though it may be very small) *over the additional cost of the movement of that traffic.*

175 U. S., pp. 674, 675, Louisville, etc., R. R. Co. v. Behlmer.

181 U. S., p. 20, E. T. V. & G. Ry. Co. v. I. C. C.

Within the above limits, any rates which may be accepted by the appellees upon traffic to Atlanta are lawful.

The first limitation suggested by me concedes that the rates charged by the appellees to the noncompetitive point (La Grange) must not be unjust or unreasonable (175 U. S., p. 674; 181 U. S., p. 20); *i. e.*, that they must be such rates as would be regarded as perfectly fair, were it not for the fact that the appellees are charging less rates to Atlanta and the other longer distance points.

If the rates charged by the appellees to La Grange are not

just and reasonable, they violate the first section of the act; they must be condemned under that section; and there is no need to invoke the operation of either of the subsequent sections.

But if the rates charged by the appellees to La Grange are just and reasonable (a question which I have hereinbefore considered under the first section of the act), we have the case of a complaint made on behalf of certain persons at La Grange who are charged rates which are perfectly just and reasonable; and whose only real objection is that the appellees are charging less rates to Atlanta, and the other longer distance points.

As said by Lord Curriehill, in Hozier v. the Caledonian Ry. Co., their complaint "may be likened to that of the laborer, who, having worked all day, complained that others, who had worked much less, received a penny like himself."

1 Nev. & Mac., p. 32, Note 4; 1 Nev. & Mac., pp. 45, 47, Jones v. E. C. Ry. Co.; 2 Nev. & Mac., p. 202, Foreman et al. v. Great Eastern Ry. Co.; 1 Nev. & Mac., pp. 97-108, Harris v. Cockermouth, etc., Ry.; 1 Nev. & Mac., p. 120, Ransome v. E. C. Ry. Co.

The Hozier case was cited by this Court in 145 U. S., p. 282, and in 162 U. S., p. 222.

The Jones case was cited by this Court in 145 U. S., p. 283.

The Foreman case was cited by this Court in 162 U. S., p. 222.

And the Harris case was cited by this Court in 162 U. S., pp. 223, 224.

If the rates to La Grange are just and reasonable (a question which I have hereinbefore considered under the first section), the appellees ought not to be required to reduce them; even though such reduction may be necessary to place La Grange upon a "rate equality" with Atlanta, and the other longer distance points; because such a reduction in rates to La Grange, *and the other shorter distance points* involves a serious reduction in the revenue which the appellees derive from the present rates to those points.

The Auditor testifies that the loss of revenue would amount to $63,331.56 per annum.

Hunter Dep., Conn. Test., p. 90.

The second limitation suggested by me concedes that the competition at Atlanta must be such as subserves the public interest as well as the interest of the carrier; that it must be real, and not artificial or merely conjectural; and that it must be material and substantial, *i. e.*, such as to compel the acceptance of the rates that are charged by the appellees to that point.

175 U. S., p. 675.

181 U. S., p. 18 22.

The third limitation suggested by me concedes that the rates accepted by the appellees on traffic to Atlanta, and the other longer distance points, must yield some profit (though it may be very small) *over the additional cost of the movement of that traffic.*

181 U. S., p. 18, E. T. V. & G. Ry. Co. v. I. C. C.

If the competition at Atlanta be real, and such as to affect rates, the carriers must accept those rates or abandon the competitive traffic.

If the rates be so low as not to pay the additional cost of the movement of the competitive traffic, the carriers ought not to be allowed to compete for it. It would not be to their interest to carry the traffic at a loss; and it would not be to the interest of the public for them to do so, because no one is ever benefited in the long run by having another work for him at a loss.

But if the competition be real, and such as to affect rates, and if those rates pay something more than the additional cost of the movement of the traffic, it is to the interest of the carriers, as well as to the interest of the public, that the carriers should be allowed to compete for the traffic. Whatever profit there may be in the traffic, increases, to that extent, the revenues of the carriers; and if there be a profit (however small), there is, of course, no "loss" to be reimbursed by increasing the local rates.

181 U. S., p. 18, *et seq.*, E. T. V. & G. Ry. Co. v. I. C. C.

On the contrary, the local stations are benefited by allowing the carriers to participate in the competitive traffic; because whatever profit may be realized from that traffic (however small it may be), has a tendency to reduce the local rates and to improve the local service.

All three of the limitations suggested by me are entirely practical.

Though the question of the reasonableness of the rates to La Grange involves (as I have heretofore shown) a very difficult problem; it is one which, upon proper evidence, is capable of judicial determination; and there are many cases in the Federal Jurisprudence, in which such questions have been determined by the courts.

It is also entirely practicable to determine whether the competition at Atlanta subserves the public interest as well as the

carrier's interest; whether it is real or artificial; and whether it is material, and substantial, and such as to affect rates.

It is also entirely practicable to ascertain whether the rates accepted by the appellees on traffic to Atlanta, and the other longer distance points, yield a profit over the additional cost of the movement of that traffic. For, while it is impossible to ascertain the cost of carrying any particular ton of freight, or any particular class of freight, it is entirely practicable to closely approximate how much the expenses of a company will be increased by moving a certain traffic, over and above what they would be, if that particular traffic were declined; and such increase represents what is called *the additional cost of movement.*

I submit that the practical limitations, which I have suggested, are far preferable to the theoretical "scale of comparison between the dissimilarity of conditions and the disparity of rates" suggested by Judge Severens; and that the limitations suggested by me have been, in effect, approved by this Court in Louisville, etc., R. R. Co. v. Behlmer, 175 U. S., pp. 674, 675; and in E. T. V. & G. Ry. Co. v. I. C. C., 181 U. S., p. 18, *et seq.*

In the Georgia Railroad Commission cases, the Circuit Court of Appeals says:

"As the noncompetitive point thus gets the benefit of the lowest rate to any of the neighboring competitive points; and as the carriage of competitive traffic to the respective competitive points is remunerating to the carriers to an extent that more than pays the expense of moving the competitive traffic, it is difficult to perceive how the noncompetitive points are subject to any undue or unreasonable prejudice or disadvantage by this scheme of rate-making."

93 Fed. Rep., p. 92, I. C. C. v. W. & A. R. R. Co. et al.

LXX.

Counsel's Misapplication of the Maxim, "So Use Your Own that You do not Injure the Interest of Another."

Counsel for appellant in the Circuit Court contended:

That in determining the extent to which a carrier may go in protecting its own interests, we should apply the maxim of the law, "'So use your own that you do not injure the interest of another;' and that under said maxim, discrimination is only justified to the extent that it may be practiced without inflicting material injury on any *legitimate* interest of the public, or any portion of the public."

The maxim quoted by counsel is conceded, when properly understood.

I concede that competition is no justification for a lesser charge for a longer haul, unless the competition at the longer distance point be such as subserves the public interest.

But in this case, the public consists of three classes of persons:

First: The public at New Orleans.

Second: The public at Atlanta.

Third: The public at La Grange.

That the public at La Grange is discriminated against is admitted; but my contention is that the discrimination is not unlawful, because it is not *unjust*.

The public at La Grange may be injured (though not in a legal sense) in not being able to compete on equal terms with Atlanta in the territory which lies between those places. But the public at New Orleans, as well as the public at Atlanta, is greatly benefited by the competition which exists at Atlanta.

The Court must look to the interest *of the great majority of the public;* and if it conflicts with the interest of a small minority, the loss to the latter is, in contemplation of law, *damnum absque injuria.*

Neither an individual, nor any "portion of the public" has any "*legitimate* interest" in a question *of public policy*, which can be allowed to prevail against the interest of the majority.

A single individual, or any "portion of the public," is entitled to be protected in life, liberty, and property, against the majority, however large the majority may be. But when it comes to a mere question *of public policy*, the universal rule is, *Salus populi suprema lex.*

The question in this case is merely one *of public policy.* The Court will place in one scale the public at New Orleans, together with the public at Atlanta; while in the other scale it will place the public at La Grange; and the legitimate interest of the public, as a whole, will be found in that scale which may preponderate.

Suppose the appellees should tomorrow withdraw from competition at Atlanta. It is obvious that such withdrawal would operate not only to the serious injury of the public at Atlanta, but also to the serious injury of the public at New Orleans, who are engaged in the sale and shipment of goods to Atlanta. But

such withdrawal would not reduce the La Grange rates in the least.

181 U. S., pp. 19, 20.

In a word, the public at La Grange would not be benefited, while the public at New Orleans, as well as the public at Atlanta, would be seriously injured.

As a matter of fact, even the public at La Grange is interested in preserving the competition which exists at Atlanta. The Commission finds and reports that:

"Changes in rate conditions at Atlanta have ordinarily worked similar changes in rates to La Grange. Thus a first-class rate of $1.43 on traffic from New Orleans to La Grange, made by adding the $1.03 rate to Atlanta and the 40 cent local from Atlanta to La Grange, would be reduced to 80 cents, if, during a rate war, the first-class rate from New Orleans to Atlanta should be as low as 40 cents."

Trans., p. 32.

In the case of the E. T. V. & G. Ry. Co. v. I. C. C., 181 U. S., pp. 19, 20, this Court said:

"Indeed, the findings of fact made by the Commission in this case leave no room for the contention that either undue preference in favor of Nashville (the longer distance point) or unjust discrimination against Chattanooga (the shorter distance point) arose merely from the act of the carriers in meeting the competition existing at Nashville. The Commission found that if the defendant carriers had not adjusted their rates to meet the competitive conditions at Nashville, the only consequence would have been *to deflect the traffic at the reduced rates over other lines.* From this it follows that, even although the defendant carriers

had not taken the dissimilarity of circumstance and condition into view, and had continued their rates to Nashville just as if there had been no dissimilarity of circumstance and condition, *the preference in favor of Nashville growing out of the conditions there existing would have remained in force and hence the discrimination which thereby arose against Chattanooga would have likewise continued to exist. In other words, both Nashville and Chattanooga would have been in the same position* if the long and short haul clause had not been brought into play." . . . . "To compel the carriers to desist from all Nashville traffic under the circumstances stated would simply result in deflecting the traffic to Nashville to other routes, and thus entail upon the carriers who were inhibited from meeting the competition, although they could do so at a margin of profit, the loss which would arise from the disappearance of such business, *without anywise benefiting the public.*"

181 U. S., pp. 19, 20.

LXXI.

The Argument of Counsel for Appellant Would Compel the Adoption of Mileage Rates, Which Have Been Abandoned Wherever Tried.

Counsel for appellant contends that while some difference between the rates to La Grange, and the rates to the longer distance points, may be justifiable, the present differences are too great. He does not suggest what the differences ought to be, other than that the rates to La Grange ought not to be higher than the rates to Atlanta.

Under the order made by the Commission in this case the appellees are enjoined from charging any greater compensation to La Grange than to the longer distance points; but they are not enjoined from charging as great compensation to the former as to the latter. Such an order is intelligible under the *fourth* section; but it is wholly unintelligible under the *third* section.

If it constitutes undue preference in favor of the longer distance points, to charge less to them than to La Grange, it constitutes undue prejudice against La Grange, to charge as much to it as to the longer distance points. If distance is to be the controlling factor in determining whether undue prejudice exists in a given case, *all rates must be constructed upon a mileage basis;* and instead of permitting the appellees to charge as much to La Grange, as to the longer distance points, the Commission, if it had the power to fix future rates, should have ordered the appellees to charge less to La Grange; and to so reduce their rates to La Grange, as to make them the same per ton per mile as those charged to the longer distance points. In a word, the Commission (if it had any power to prescribe future rates), should have ordered the appellees *to construct their tariffs on a mileage basis.*

In the Georgia Railroad Commission cases, the Circuit Court of Appeals said:

"If the mere charging of a greater rate for the shorter than for the longer haul gives an undue and unjust preference to the longer distance points, and subjects the shorter distance points to any undue prejudice or disadvantage, it is difficult to see how the charging exactly the same rate for the shorter haul, that is charged for the longer, shall escape condemnation."

93 Fed. Rep., p. 91, I. C. C. v. W. & A. R. R. Co. et al.

If charging the same rate for the shorter haul, that is charged for the longer haul, subjects the shorter distance points to undue prejudice or disadvantage, it is evident that the only way in which the undue prejudice or disadvantage can be removed, is to construct the rates to the shorter distance points, as well as to the longer distance points, according to mileage.

The theory of equal mileage rates is entirely correct in all cases *where competition does not interfere with it.* But in cases where competition does interfere, the theory of equal mileage rates cannot be adopted in actual practice; and though it has been proposed in every country, it has been abandoned by all.

In the report of the case of Ransome v. E. C. Railway, on page 71 of 1 Nev. & Mac., in Note 6, there is an abstract from the report of the English Parliamentary Committee upon the amalgamation of railways in 1872, in which they declare equal mileage rates to be impracticable.

"First, because *it would prevent railway companies from lowering their rates so as to compete with traffic by sea, by canal, or by a shorter or otherwise cheaper railway, and would thus deprive the public of the benefit of competition, and the company of a legitimate source of profit.*"

Second, "it would prevent railway companies from making perfectly fair arrangements for carrying at a lower rate than usual, *goods brought in large and constant quantities, or from carrying for long distances at a lower rate than for short distances.*"

The report continues: "In short, to impose equal mileage rates on the company *would be to deprive the public of the benefit of much of the competition* which now exists, or has existed; to

raise the charges on the public in many cases where the companies now find it to their interest to lower them; and *to perpetuate monopolies*, in carriage, trade and manufacture, *in favor of those routes and places which are nearest* and least expensive, where the varying charges of the company now create competition. And it will be found that the supporters of equal mileage, when pressed, often really mean, *not that the rates they themselves pay are too high, but that the rates others pay are too low.*"

In March, 1885, the Senate appointed a Select Committee on Interstate Commerce. The committee took a mass of testimony, filling a volume of 1,450 pages; and made a report which, with its appendix, fills over 200 pages, and in its report is embodied the report of the English Parliamentary Committee, quoted above.

See Report, Senate Select Committee on Interstate Commerce, January, 1886, p. 57.

In the case of I. C. C. v. Alabama Midland Railway Company, Judge Bruce said: "In the case at bar there are questions of competing lines; and the proposition of the complainant is that notwithstanding this, the circumstances and conditions are substantially the same, and that it is in violation of the fourth section of the statute to charge more for the short haul to Troy, the shorter distance, than to Montgomery, the longer distance point. This argument proceeds upon the view that distance is the controlling factor on a question of rate for transportation of property; and yet *these other matters may be, and often are, more controlling than even distance itself.*"

69 Fed. Rep., p. 231, I. C. C. v. Alabama Midland Ry. Co.

In the case of Imperial Coal Co. v. Pittsburg & L. E. R. Co., it was held by the Commission that "in determining the question

of undue prejudice from a rate, distance is only one of the factors, and other material facts, such as character and quality of the commodity, cost of production, *extent and nature of the competition in the business itself and by other transportation lines*, and the interests of the public in the use of the commodity and its market cost, are to be considered."

2 I. C. Rep., p. 436, Imperial Coal Co. v. Pittsburg & L. E. R. Co., 3d head note.

In the case of Savannah Bureau of Freight and Transportation v. Charleston & Savannah Railway Co., decided December 31, 1897, the Commission said: "Upon the other hand, *it often happens that distance is altogether disregarded*, and it has been held that this may be proper within certain limits and under certain conditions."

7 I. C. Rep., p. 474, Savannah Bureau of Freight & Transportation v. Charleston & Savannah Ry. Co.

In the case at bar, the Court is asked to hold that the mere fact that a greater rate is charged for a shorter than for a longer distance, constitutes an undue preference of the longer distance point over the shorter distance point. The charge of undue preference *is based upon distance alone*, and it must be sustained, if at all, upon the theory that distance must control in rate-making, to the disregard of all other circumstances and conditions.

LXXII.

Neither the Common Law Nor the Act to Regulate Commerce Requires Equality of Charge, Except Where the Services Are Similar.

In the case of I. C. C. v. B. & O. R. R., 145 U. S., 175, Mr. Justice Brown, speaking for this Court, says: "Prior to the enactment of the act of February 4, 1887, to regulate commerce, commonly known as the Interstate Commerce Act, 24 Stat., 379, c. 104, railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons *for the same service* (citing cases), though the weight of authority in this country was in favor of an *equality of charge* to all persons *for similar services.*"

It has been held, in effect, by this Court repeatedly that the service rendered by a carrier in the transportation of traffic to a competitive point, is not "similar" to the service rendered in the transportation of traffic to a noncompetitive point.

162 U. S., pp. 219, 239, T. & P. Ry. Co. v. I. C. C.
168 U. S., pp. 144–175, I. C. C. v. Ala. Midland Ry. Co.
175 U. S., pp. 648–675, L. & N. R. R. Co. v. Behlmer.
181 U. S., pp. 1 *et seq.*, E. T. V. & G. Ry. v. I. C. C.

Therefore a person shipping to a noncompetitive point is not entitled to an "equality" of charge with one shipping to a competitive point.

In Ex Parte Koehler, 31 Fed Rep., p. 321, Judge Deady said :

" The places between which competition in transportation exists between water craft and railways, *or even the latter*, always will and must send and receive freight at lower rates than others not so favored. This is the result of natural advantage, supplemented often by exceptional sagacity and enterprise, and it would be folly in the Legislature to prevent it if it could. As long as people and places differ so widely in capabilities and facilities, social or business equality is impossible. Society can do no more than to give each one an even chance and a fair show to make the most of his or its opportunities, and leave the result to circumstances over which it has little, if any, direct control."

In the case of Brewer & Hanleiter v. Central of Georgia Railway Co., 84 Fed. Rep., p. 268, Judge Speer said: " Shall government undertake the impossible but injurious task of making the commercial advantages of one place equal to those of another? It might as well attempt to equalize the intellectual powers of its people. There should be no attempt to deprive a community of its natural advantages, or of those legitimate rewards which flow from large investments in business industries, and competing systems of transportation to facilitate and increase commerce. The Act to Regulate Interstate Commerce has no such purpose, and yet this appears to be the inevitable result of the decree the complainants seek in the case, without any adequate corresponding advantage either to themselves or to the community in which they live."

If the law be that all persons are entitled to an " equality " of charge, there would be no use for the first section of the act which requires that rates be reasonable; nor for the second section of the act which prohibits unjust discrimination; nor for

the third section of the act which prohibits undue preference; nor for the fourth section of the act which prohibits a greater charge for a shorter distance than for a longer distance, etc. If the law be that all rates shall be equal; or that all rates shall be equal in proportion to mileage; the first four sections of the act are wholly unnecessary.

LXXIII.

Competition is Necessarily a Dominating Factor in Fixing Rates.

If the fact of competition is *not* to be allowed to operate as a *dominating* factor in fixing the charges for transportation at competitive points, then it must be prohibited or stifled altogether. Because, if competition be allowed to operate at all, it *necessarily* becomes a *dominating* factor in fixing the charges for transportation at competitive points.

As said by Judge Deady:

"The places between which competition in transportation exists between water craft and railways, *or even the latter*, always will, and must, send and receive freight at lower rates than others not so favored."

31 Fed. Rep., p. 321, Ex Parte Koehler.

We are therefore confronted with the question as to whether it was the intention of Congress, in passing the Act to Regulate Commerce, to prohibit or stifle competition.

The fifth section of the act, which prohibits pooling, is alone sufficient to show that Congress had no such intention. It expressly prohibits every contract, agreement, or combination for pooling; and pooling was prohibited because it was supposed to have a tendency to stifle competition.

In the case of I. C. C. v. B. & O. R. R. Co., Mr. Justice Brown, speaking for this Court, said that:

"It was not the design of the act to stifle competition."
145 U. S., p. 281, I. C. C. v. B. & O. R. R. Co.

If it was not the design of the act to stifle competition, and if the necessary effect of competition is to enable those places between which competition exists to send and receive freight at lower rates than others not so favored, such competition must be allowed to become a dominating factor in fixing the relative charges of transportation.

The competition at Atlanta is "such as, having due regard for the interests of the public and of the carrier, ought justly to have effect upon the rates;" and therefore it can be properly considered. If the competition be such as can be properly considered at all, it must, of necessity, be allowed to *control* in fixing rates to Atlanta.

There can be no middle course. The courts must hold either that competition *can* be considered, or that it *cannot* be considered in fixing competitive rates.

If they hold that it cannot be considered in fixing competitive rates, then the short rail lines and the water lines will have a monopoly of the transportation business of the country. If, on the other hand, the courts adhere to the doctrine decided by this Court, that competition, such as affects rates, and such as subserves the interests of the public as well as of the carrier, may be considered in fixing competitive rates, then such competition must, of necessity, *control* in the fixing of those rates. All competing lines, however numerous they may be, must accept the lowest rates offered by any one of them, or all but one of them must abandon the competitive traffic altogether.

LXXIV.

The Discrimination Which Exists in This Case Against La Grange is Not Caused by Any Fault or Contrivance of the Appellees.

In Ex Parte Koehler, Judge Deady said:

"It is not the fault or contrivance of the railway that compels the discrimination, but it is the necessary result of circumstances altogether beyond its control. It is not done wantonly, for the purpose of putting the one place up, or the other down, but only to maintain its business against rival and competing lines of transportation. In other words, the matter, so far as the railway is concerned, resolves itself into a choice of evils. It must either compete with the boats during the season of water transportation, and carry freight below what the Legislature declared to be a reasonable rate, or abandon the field and let its road go to rust."

23 Fed. Rep., 533, Ex Parte Koehler.

In another case Judge Deady said:

"Freight carried to or from a competitive point, is always carried under substantially *dis*similar circumstances and conditions from that carried to or from noncompetitive points. In the latter case, the railway makes its own rates, and there is no good reason why it should be allowed to charge less for a long haul than for a short one. When each haul is made from, or to, a noncompetitive point, the effect of such discrimination is to build up one place at the expense of the other. Such action is wilfully unjust, and has no justification or excuse in the exigencies or conditions of the business of the corporation. In the former case, the circumstances are altogether different. The power of the corporation to make a rate is limited by the necessities of

the situation. Competition controls the charge. It must take what it can get, or abandon the field, and let its road go to rust."

31 Fed. Rep., p. 319, Ex Parte Koehler.

181 U. S., pp. 18, 19, 20, E. T. V. & G. Ry. Co. v. I. C. C.

In the case at bar, it is not the fault or contrivance of the appellees that causes the discrimination in favor of Atlanta, and the other longer distance points; but it is the necessary result of circumstances altogether beyond their control. It is not done wantonly, for the purpose of putting those places up, or of putting La Grange down; but only to maintain appellees' business against rival and competing lines of transportation. In other words, the matter, so far as appellees are concerned, resolves itself into a choice of evils. Appellees must either compete with the other railroads which run from New Orleans to Atlanta, and with railroads which run from other markets to Atlanta, or abandon the Atlanta traffic altogether. The power of appellees to make rates to Atlanta is limited by the necessities of the situation. Competition controls the charge at Atlanta. The appellees must take what they can get, or abandon the field at Atlanta.

The rates from Atlanta to Fairburn, Palmetto, Newnan and Hogansville (the other longer distance points) are fixed by the Georgia Railroad Commission, and cannot be exceeded; and appellees' through rates from New Orleans to Fairburn, Palmetto, Newnan and Hogansville, cannot exceed the competitive rates from New Orleans to Atlanta, added to the rates fixed by the Georgia Railroad Commission from Atlanta to those points respectively. *The result is that the through rates from New Orleans to those points are as completely controlled by the competition at Atlanta, as are the Atlanta rates themselves.*

LXXV.

The Longer Distance Points in This Case Are Not "Favored" by the Appellees.

Atlanta is certainly not "favored" in any other sense than that the rival lines centering at that point compete with each other as the Interstate Commerce Act permits them to do.

If those lines should enter into any contract, agreement, or combination to pool their freights at that point, and in that way (as is supposed) to stifle competition, they would commit an offense against the fifth section of that act. If they should enter into any "trust" arrangement to control the rates at that point, they would render themselves amenable to the Anti-Trust Law.

166 U. S., p. 290, U. S. v. Frt. Assn.

The appellees are therefore placed in this dilemma. If they enter into any contract, agreement, or combination to stifle competition at Atlanta, they violate one, and, perhaps, two acts of Congress. If they compete with each other, in good faith, at Atlanta, the necessary result of such competition (as said by Judge Deady) is to reduce the rates at Atlanta, and according to counsel for appellant they are guilty of "favoring" Atlanta; which is but another way of saying that they give to Atlanta an *undue* and *unjust* preference. It would seem, therefore, "that they are to be damned if they do, and to be damned if they don't."

If it be said that Atlanta is "favored" over La Grange, in the sense that Atlanta is geographically so located as to have become the point of intersection of numerous rival lines of rail-

way, and the strategetical rate-making center of the southeastern section of the United States, the fact is admitted ; but it furnishes no just ground of complaint either against Atlanta, or against the railway lines which center there.

As said by Judge Deady, "It is not the fault of the railways that the shipper, who does business at a competing point, has the advantage of it."

23 Fed. Rep., 533, Ex Parte Koehler.

Neither is it the fault of Atlanta, or of the merchants who are located there, that they have the benefit of the competition which exists there. As said by the English Court of Appeals: "I cannot see, looking at the matter as between the two traders, why the advantageous position of the one trader in having his works so placed that he has two competing routes, is not as much a circumstance to be taken into consideration, as the geographical position of the other trader, who, though he has not the advantage of competition, is situated at a point on the line geographically nearer the market."

"Why the logical situation, in regard to its proximity to the market, is to be the only consideration to be taken into account, in dealing with the question, as a matter of what is reasonable and right as between the two traders, I cannot understand. Of course, if you are to exclude this from consideration altogether, *the result must inevitably be to deprive the trader who has the two competing routes of a certain amount of advantage which he derives from that favorable position of his works.*"

Law Rep. (1892), 2 Q. B., p. 242, Executors of Phipps v. L. & N. W. Ry. Co.

LXXVI.

The Disadvantage Under Which La Grange Labors is not Occasioned by Any Action of the Appellees.

Counsel for appellant contends that shorter distance points in the South (such as La Grange), are "blighted by the disadvantage with which they are burdened." It becomes important, therefore, to ascertain by what disadvantage La Grange is burdened; and by whom that burden is imposed. Is it burdened by any disadvantage except that no competing lines of transportation center there? And is that a disadvantage occasioned by the action of the appellees, or is it a disadvantage which arises solely from the geographical location of that place?

Counsel also speaks of the longer distance points in the South growing "prosperous in the sacrifice of others." Can any one show, or will any one undertake to assert, that prior to the promulgation of the rates which competition has forced the carriers to accept upon Atlanta traffic, La Grange enjoyed lower rates than it now enjoys? On the contrary, is it not a notorious fact that the wagon rates to La Grange were very much higher than the railroad rates are now; and is it not manifest that as La Grange rates base upon Atlanta, every reduction which competition has heretofore forced in the Atlanta rates, has inured, to the full extent of such reduction, to the benefit of La Grange? If that be true, how can it be said that Atlanta has grown prosperous "in the sacrifice of La Grange?" On the contrary, La Grange has been benefited by the reduction in Atlanta rates; and Atlanta, instead of becoming prosperous "*in the sacrifice of La Grange*," has shared her prosperity with La Grange.

The Commission finds and reports that "changes in rate con-

ditions at Atlanta have ordinarily worked similar changes in rates at La Grange. Thus, a first-class rate of $1.43 on traffic from New Orleans to La Grange, made by adding the $1.03 rate to Atlanta and the 40 cent local from Atlanta to La Grange, would be reduced to 80 cents, if, during a rate war, the first-class rate from New Orleans to Atlanta should be as low as 40 cents."

Trans., p. 32.

LXXVII.

Local Noncompetitive Stations in the South Have Prospered Since the Civil War as Much as Similar Stations in the North.

Counsel for appellant, speaking of the Southern method of making rates by charging more for a shorter than for a longer distance, where competition compels the lower charge to the longer distance point, contends that:

"With this as a rule in adjusting rates, the poor places must become poorer, and the localities more sparsely settled than ever."

It is true that the density of population and of traffic is much greater in the States north of the Ohio and east of the Mississippi River than it is in the States south of the Ohio; but the fact may be accounted for in many ways other than by ascribing it to the difference which it is claimed exists in the method of rate-making in the two territories. The prejudice against slavery which was entertained by all Europe discouraged European immigration to the South, and induced it to the North. Among the immigrants there were numerous skilled mechanics and miners, who developed the mining and manufacturing industries of the North; while the South remained, until after the civil war, an exclusively agricultural country. Since the civil war, the in-

dustries of the South have become more diversified; and the local noncompetitive sections in the South have prospered as much as, if not more than, similar stations in the North.

In 1872, the Legislature of Ohio enacted a law, which prohibits absolutely the charging of more for a short than for a long haul, regardless of the circumstances or conditions under which traffic is carried.

The census shows that sixty local noncompetitive stations in Ohio (having a population of 1,000 or more) increased in population between 1880 and 1890. Those stations are as follows:

Ada, Antwerp, Avondale, Barnesville, Blanchester, Cardington, Carrollton, Cedarville, Chagrin Falls, Chardon, Cleves, DeGraff, Delta, Dennison, Doylestown, Dresden, East Liverpool, East Palestine, Eaton, Elmore, Franklin, Garrettsville, Georgetown, Glendale, Granville, Harrison, Hicksville, Jamestown, Jefferson, Linwood, Logan, Louisville, McConnellsville, Manchester, Minster, Montpelier, Navarre, Nelsonville, New Bremen, New Straitsville, North Amherst, Oberlin, Oxford, Paulding, Piketon, Plain City, Port Clinton, Richwood, St. Bernard, St. Mary, Salem, Salineville, Stryker, Tippecanoe, Wadsworth, Wapakoneta, Wellsville, Westerville, Westwood, Wyoming.

The total population of those local stations was:

In 1890	125,318
In 1880	92,481
Increase	32,837
Percentage of increase	35 per cent

The census shows that the following named sixty local noncompetitive stations in the South (having a population

of 1,000 or more) increased in population between 1880 and 1890, viz.:

Auburn, Ala.; Barbourville, Ky.; Bolivar, Tenn.; Camden, S. C.; Campbellsville, Ky.; Chapel Hill, N. C.; Clinton, Tenn.; Covington, Tenn.; Cullman, Ala.; Cuthbert, Ga.; Darlington, S. C.; Dyersburg, Tenn.; Eatonton, Ga.; Elkton, Ky.; Evergreen, Ala.; Fayetteville, Tenn.; Florence, S. C.; Franklin, Ky.; Franklin, Tenn.; Fort Gaines, Ga.; Glasgow, Ky.; Graniteville, S. C.; Greenville, N. C.; Greenville, Ala.; Lebanon, Ky.; Laurinburg, N. C.; Madisonville, Ky.; Marion, S. C.; Marshallville, Ga.; Maryville Tenn.; Morganton, N. C.; Monroe, N. C.; Oxford, N. C.; Phœnix, Ala.; Piedmont, S. C.; Pulaski, Tenn.; Randleman, N. C.; Reidsville, N. C.; Rogersville, Tenn.; Salisbury N. C.; Somerset, Ky.; Sparta, Ga.; Statesville, N. C.; Summerville, S. C.; Sumter, S. C.; Talbotton, Ga.; Tallapoosa, Ga.; Tallassee, Ala.; Thomasville, Ga.; Toccoa, Ga.; Tullahoma, Tenn.; Union Springs, Ala.; Walterboro, S. C.; Washington, Ga.; Washington, N. C.; Waynesboro, Ga.; West End, Ga.; Winchester, Tenn.; Winnsboro, S. C.; Yazoo, Miss.

The total population of those local stations was:

In 1890	124,574
In 1880	77,664
Increase	46,910
Percentage of increase	60.4 per ct

In other words, it will be seen that taking sixty local noncompetitive stations in Ohio, in which State there has been in force since 1872 a long and short haul law, which takes no account of the circumstances and conditions under which traffic is carried, and comparing them with sixty local noncompetitive stations in the South, where the Southern system of rate-making

has obtained since 1872, the increase in population of said local noncompetitive stations in Ohio was only 35 per cent, as against 60 per cent increase in the population of said sixty Southern local noncompetitive stations.

Mr. Cary testifies that the population of La Grange "has increased very considerably" since the construction of railroads.

Complainant Calloway testified that in 1890, the population of La Grange was 3,100; that since then, there has been built an 18,000 spindle cotton mill; and that the population is now between 4,000 and 5,000 people.

Trans., p. 83.

It is to the pecuniary interest of every railroad to develop the traffic of its local stations; and, by that process of development, such stations gradually increase in population, manufactures, etc., until they become so large as to invite the construction of other railroads; and in time they develop into competing points. The process, however, is gradual, and necessarily slow; but it is a *natural* process of evolution. The Commission, however, is not content to await the operation of natural causes; and it proposes, by an artificial process, to place noncompetitive stations upon an arbitrary equality with competitive stations. It is contended that such arbitrary process of leveling the railroad rates of the country is not only authorized, but required, by the Act to Regulate Commerce. On the contrary, Judge Deady said:

"Congress never intended to make this act a Procrustean bed, in which the conduct of the business of all the roads engaged in interstate commerce shall be made to conform to one arbitrary rule, without reference to the probable and even unavoidable difference in the conditions and circumstances under which it must be transacted."

31 Fed. Rep., pp. 320, 321, Ex Parte Koehler.

LXXVIII.

The Reduction of Rates to La Grange Would Not Increase Either the Tonnage or the Revenue of Appellees' Line.

Counsel for appellant contends that if the shorter distance points were not charged more than the longer distance points, the traffic of the shorter distance points would be increased, and, in that way, the carrier's revenue would be increased.

A similar suggestion was pressed upon Mr. Justice Brewer in the case of Chicago & N. W. Ry. Co. v. Dey, and in reply thereto he said:

"Again it is said that it cannot be determined in advance what the effect of the reductions will be. Oftentimes it increases business, and who can say that it will not in the present case so increase the volume of business as to make it remunerative, even more so than at present? *But speculations as to the future are not guides for judicial action.* Courts determine rights upon existing facts. Of course there is always a possibility of the future; good crops may increase transportation business, poor crops reduce; high or low rates may likewise affect; but the only fair, judicial test is to apply the rates to the business that has been done in the past, and see whether, upon that basis, such rates will be remunerative, or compel the transaction of business at a loss."

35 Fed. Rep., p. 881, Chicago & N. W. Ry. Co. v. Dey.

The Commission itself admits in this case that "whether defendants (*i. e.*, appellees) would or would not lose any of their present revenue if New Orleans-La Grange rates were reduced to the Atlanta basis is altogether a speculative question."

Trans., p. 46.

If the Government of the United States desires to conduct experiments in railroad rate-making, as it has a perfect right to do, it should either defray the expense of such experiments, or guarantee the companies against loss resulting therefrom. If the Government should see proper to exercise its right of eminent domain by appropriating the interstate railroad property of this country to its own use, I believe that the owners of railroad property would, in general, be more than willing to surrender the railroads to the Government, at anything like a fair valuation. But so long as the Government insists upon the railroads being operated by their owners, the owners ought not to be forced to undertake costly speculative experiments in rate-making which, in the opinion of experienced traffic managers, would result in disastrous failure.

It is fair to assume that the traffic managers of the Southern railroads, who are men of long and varied experience, and some of them of world-wide reputation, are competent judges as to what line of conduct would most tend to increase the revenues of their companies; and the financial condition of Southern railroads is such as to justify us in assuming that their traffic managers have every motive to increase their revenues. The testimony of a number of traffic officials in the South was taken in this case, upon the point as to whether a reduction in the rates to La Grange so as to make them not higher than the rates to the longer distance points, would, or would not, tend to increase the revenue of the appellees. In every instance their opinion was in the negative; and they gave their reasons for the opinions they expressed.

Trans., pp 386, 382, 392, 371, 376, 377.

Counsel for appellant, in the Circuit Court, quoted from an opinion of Hon. Aldace F. Walker, formerly a member of the Commission. But it is proper to state that Mr. Walker never had any experience in the operation of railroads in Southern

territory. A line of conduct which might be eminently wise in Trunk Line territory, where population and traffic are very dense, might be eminently unwise in Southern territory, where the population is sparse; and the volume of traffic, which is light, is scattered at long intervals, through large sections of country, some of which are incapable of supporting even the few people that inhabit them.

Sometimes a reduction in rates will increase the consumption of certain articles, and in that way increase the traffic, and consequently, the revenue of railways carrying the traffic. But it is by no means true in all cases. In fact, it is true in no case, except where the rate charged for transportation represents so large a proportion of the market value of the article transported, *that it is practicable for the merchant who sells the article to give the consumer the benefit of the reduction.* To illustrate my meaning:

By reference to the report and opinion of the Commission in this case, it will be noticed that the largest reduction that would have to be made in order to bring the La Grange rates down to the level of Atlanta rates is 40 cents per hundred pounds on first class goods from New Orleans to La Grange.

Trans., pp. 34, 35.

Dry goods are first-class. On a hat weighing six ounces, a difference of 40 cents per one hundred pounds would amount to only 15-100 of a cent. A difference of 40 cents per hundred pounds on coffee amounts to only 4 mills per pound; and to a consumer purchasing ten pounds of coffee for domestic use, the difference would amount to only 4 cents.

It is manifest that while such a reduction in rates might enable the merchant to realize a slightly greater profit on his sales to consumers, it would, in most instances, be of no importance whatever, so far as the consumer is concerned. No one would

wear more hats, or drink more coffee, because of any such reduction in rates; for, even if the merchant were disposed to give the consumer the benefit of the reduction, *the amount is too small to make the change.*

Counsel referred in the Circuit Court, to what the reduction would amount to *on car-load quantities.* But *consumers* seldom purchase in car-load quantities, and they never purchase in car-load quantities the higher classes of freight, such as dry goods, etc., etc.

Sugar, molasses, and rice constitute the bulk of the New Orleans-La Grange traffic.

Trans., pp. 281, 295.

Mr. Smith, the Auditor of the Interstate Commerce Commission, testifies that it is a well-known fact that the actual consumer usually buys those articles in much less than car-load quantities.

Trans., p. 275.

Mr. Calloway testifies that his customers do not buy in car-load quantities.

Trans., p. 82.

As before stated, unless the reduction in rates is such as that it is practicable for the merchant to give the consumer the benefit of the reduction (which is seldom the case as to car-load quantities), consumption will not be increased, and therefore neither the volume of traffic carried by the railroad, nor the revenue derived from the traffic by the railroad, will be increased.

Counsel insisted, however, in the Circuit Court, that even though the reduction may inure to the benefit of the merchant alone, the merchant is a part of the public, and as such, is entitled to have the reduction ordered in his interest. It must be remembered, however, that the owners of railroad property are also a part of the public, and that their interests are entitled to some consideration. It seems to be a popular idea that whenever a merchant desires to increase his line of profit, all he has to do is to apply to a railroad commission, either State or Federal, to have his profits increased by diminishing the profits or dividends of railroad stockholders. Upon this point, in the case of Ricketts, Smith & Co. v. Midland Railway Co., Law Rep. (1896), 1 Q. B., p. 266, the English Railway Commission, speaking through Collins, J., said:

"I think, therefore, that the reasonableness of the rate *is not to be tried by its effect upon the trade of the persons who have to pay it.* It may be a prudent thing for a carrier to tempt traffic by charging rates much lower than he would reasonably be justified in demanding having regard to the elements which I have referred to as primarily affecting the reasonableness of the rate; but this is a question of railway management, which, in my judgment, lies outside our province. *Within these limits he is entitled to get as much as he can, even though he thereby diverts a large part of the merchant's profit into his own pocket.*"

If the rates to La Grange should be reduced, so as to be not higher than the rates to Atlanta, it would doubtless, in some instances, induce merchants at La Grange to purchase their goods in New Orleans instead of purchasing them at Atlanta. But the volume of their purchases would be no greater than they have heretofore been. The number of their customers would not be increased; the amount consumed by their customers would not be increased; and, therefore, traffic, and the revenue of the railroads, would not be increased. While there might be

a *diversion* of a certain portion of traffic from Atlanta to New Orleans, there would be no substantial *increase* in the aggregate volume of traffic.

Unless reductions in rates are such as *to reach consumers and induce them to use more of the articles* upon which the reductions are made, there can be no *increase* of tonnage produced by such reduction.

LXXIX.

Counsel's Misconception of the Decision of this Court in the Joint Traffic Association Case.

Counsel for appellee, in the Circuit Court, quoted the following from the opinion of this Court in the Joint Traffic Association case (171 U. S., 505):

"The result of *lower* rates is *generally* a greater demand for the articles transported, and this greater demand can only be gratified by a larger supply, the furnishing of which increases commerce."

It will be noticed that this Court undertakes to state a proposition which is only *generally* true; and that it does not affirm it to be universally true. While the Court says that the result of *lower* rates is *generally* a greater demand for the articles transported, it does not say *how much* lower the rates must be made than those theretofore prevailing, in order for the reduction to increase the demand. If the La Grange rates should be made the same as the Atlanta rates, it might increase the sale at La Grange of some of the classes and commodities; and it might divert some of the traffic from Atlanta to La Grange. A mere diversion of traffic from Atlanta to La Grange would not,

however, increase either the tonnage or the revenue of the appellee companies. In order for the tonnage or revenue of the appellees to be increased, the aggregate amount of merchandise consumed in the territory between Atlanta and La Grange must be increased. And the people who reside in that territory cannot be induced to increase their purchases, unless the La Grange rates should not only be reduced as low as the Atlanta rates, but reduced to a point where the benefit of the reduction, instead of going into the pocket of the merchant, would reach the consumer, and induce him to increase his purchases.

LXXX.

It is Not a Proper Function of Government to Attempt to Equalize the Social Relations or Business Facilities of Communities.

Counsel for appellant, in effect, contends that public policy would be advanced by building up the local stations at the expense of the competitive cities. I submit, however, that it is no proper function of government to deprive the competitive cities of the strategetical advantages which they enjoy. Counsel can mean nothing else than that the commerce and population of Atlanta, and other large basing points, and trade centers, in the country, ought, at least to a certain extent, to be taken away from them, and distributed among the small local stations on the railroads which center there. In reply, I repeat the language of Judge Deady that:

"As long as people and places differ so widely in capabilities and facilities, social or business equality is impossible. Society can do no more than to give to each one an even chance and a fair show to make the most of his or its opportunities, and leave

the result to circumstances over which it has little, if any, direct control."

31 Fed. Rep., 321, Ex Parte Koehler.

I also repeat the language of Judge Speer:

"There should be no attempt to deprive a community of its natural advantages, or of those legitimate rewards which flow from large investments in business industries, and competing systems of transportation to facilitate and increase commerce."

Brewer & Hanleiter v. Central of Ga. Ry., 84 Fed. Rep., p. 268.

LXXXI.

Appellees' Rates from New Orleans to La Grange Do Not Violate the Fourth Section of the Act to Regulate Commerce.

The order of the Commission directs the appellees to cease and desist from charging any greater compensation in the aggregate for the transportation of freight articles "from New Orleans, La., for the shorter distance to La Grange, Ga., than they contemporaneously charge, demand, collect, or receive for transporting the like kind of freight traffic from New Orleans for the longer distance over the same line in the same direction to Hogansville, or Newnan, or Palmetto, or Fairburn, Ga., the shorter being included within the longer distance."

Trans., p. 50.

That part of the Commission's order which is quoted above shows upon its face that it is based alone upon what is known as the long and short haul clause of the fourth section. It enjoins the appellees to cease and desist from charging or receiving

"any greater compensation in the aggregate" for the transportation of "a like kind" of property for a "shorter distance" (to La Grange) "than for the longer distance over the same line in the same direction" (to the places named), 'the shorter being included within the longer distance." The words in quotation marks are taken literally from the long and short haul clause of the fourth section, and they cannot be found in any other section of the act.

I have shown in Sections VIII and X of this argument that competition absolutely controls the rates which appellees can obtain from New Orleans to Atlanta, and I have shown in Sections IX and XI that the Georgia Railroad Commission rates absolutely control the rates which the Atlanta & West Point Railroad can obtain from Atlanta to Fairburn, Palmetto, Newnan, and Hogansville. It is manifest, therefore, that the competition at Atlanta, in connection with the rates fixed by the Georgia Railroad Commission, controls the rates which the appellees can obtain from New Orleans to Fairburn, Palmetto Newnan, and Hogansville.

In the case of the Interstate Commerce Commission v. Alabama Midland Railway Co., this Court says:

"We are unable to suppose that Congress intended by the fourth section, and the proviso thereto, to forbid common carriers, in cases where the circumstances and conditions are substantially dissimilar, from making different rates until and unless the Commission shall authorize them to do so," etc.

168 U. S., p. 169.
175 U. S., p. 669, Louisville, etc., R. R. Co. v. Behlmer.
181 U. S., pp. 18, 19, E. T. V. & G. Ry. Co. v. I. C. C.

Again, this Court says:

"That competition is one of the most obvious and effective

circumstances that make conditions under which a long and short haul is performed substantially dissimilar, and as such must have been in the contemplation of Congress in the passage of the Act to Regulate Commerce, has been held by many of the Circuit Courts."

I. C. C. v. Ala. Midland Ry. Co., 168 U. S., p. 164.
93 Fed. Rep., p. 87, I. C. C. v. W. & A. R. R. Co. et al.
175 U. S., p. 667, Louisville, etc., R. R. Co. v. Behimer.
181 U. S., pp. 18, 19, E. T. V. & G. Ry. Co. v. I. C. C.

LXXXII.

Judge Severens' Error in Holding that the Fourth Section of the Act to Regulate Commerce May Apply, Notwithstanding There May be a Substantial Dissimilarity of Conditions.

Counsel for appellant relied in the Circuit Court upon the opinion of Judge Severens in the case of Interstate Commerce Commission v. East Tennessee, Virginia & Georgia Railway Company et al.

In that case Judge Severens, referring to the decision of the Commission in the case of the Savannah Bureau of Freight & Transportation v. Charleston & Savannah Railway Company et al., says that the Commission, "evidently disheartened by the adverse ruling of the Supreme Court in recent cases," . . . "seems to give up Section 4 as of no force or effect in any case where the conditions are not 'substantially similar.'"

85 Fed. Rep., 117.

The Judge, after referring to certain language employed in the opinion delivered by the Commission in that case, says:

"Now, I do not understand that such a conclusion follows from that decision (*i. e.*, the decision of this Court in the Alabama Midland Railway case). On the contrary, I suppose that when a violation of the long and short haul provision is charged, competition is one of the elements which enter into the determination, whether the conditions are similar, and if dissimilarity is found, *then the further question arises whether the dissimilarity is so great as to justify the discrimination which is complained of.* . . . . In other words, my opinion is that the restraint of Section 4 is to be applied upon the scale of comparison between the dissimilarity of conditions and the disparity of rates, and that it is competent, *under that section*, to restrain the exaction of the greater charge for the shorter haul, although there may be a substantial dissimilarity of conditions, provided the dissimilarity is not so great as to justify the discrimination made."

I. C. C. v. E. T. V. & G. Ry. Co. et al., 85 Fed. Rep., p. 118.

This Court expressly disapproved the construction suggested by Judge Severens, and, after quoting the above extract from his opinion, said:

"But this reasoning, whilst it does not apparently wholly rest on the erroneous view which we have previously refuted, in substance but applies to it. Indeed, it not only does this, but it more markedly destroys one provision of the statute by the other, since it in effect declares that the greater the competition at any given point the lesser power has this fact to produce the dissimilarity of circumstance and condition provided in the statute. That such is the conclusion to which the reasoning resolves itself must be the case, when it is considered that the more active competition is at a particular point the lesser the rate will be to that point, and the greater, therefore, the disparity between the charge to the competitive point than that

made to the noncompetitive one. The proposition then is this, that the greater and more potential is the influence of competition on rates and traffic, the less will be its force to engender dissimilarity of circumstance and condition; that is to say, that the causes specified in the statute are to be allowed to produce their influence in inverse ratio to their strength and importance."

181 U. S., pp. 21, 22, 23, E. T. V. & G. Ry. Co. v. I. C. C.

LXXXIII.

It is Not Necessary that There Should be Anything "Rare," "Unusual" or "Peculiar" in the Competition.

Counsel for appellant, in the Circuit Court, contended that as competition between railroads which are subject to the Act to Regulate Commerce is "ordinarily incident to the business," and therefore not "unusual," or "peculiar," it cannot create a "substantial dissimilarity" within the purview of the fourth section.

Counsel has fallen into the very error for which the Commission was reversed by this Court in I. C. C. v. Alabama Midland Ry., 168 U. S., pp. 144 to 175; L. & N. R. R. v Behlmer, 175 U. S., pp. 648 to 675; and E. T. V. & G. Ry. v. I. C. C., 181 U. S., pp. 1, 18, 19.

The error was first advanced by the Commission in the case of In Re Louisville & Nashville R. R. Co. (sometimes cited as Re Southern Railway & Steamship Association), 1 Inters. Com. Rep., p. 278, in which it was held by the Commission that where railroads "are subject to the Act to Regulate Commerce," com-

petition between them could not be considered except in "*rare and peculiar cases.*"

1 Inters. Com. Rep., p. 278, right col., 5th head note, par. (c).

The error was repeated by the Commission in the Alabama Midland case, in which the Commission said:

"No attempt is made to establish substantial dissimilarity of circumstances and conditions at Montgomery on the ground of rail competition further than by proof of the fact that there are a number of railway lines running to and through that city connecting with different parts of the country. This alone, it is scarcely necessary to say, is not sufficient. Re Louisville & Nashville R. R. Co., 1 Inters. Com. Rep., 278, 1 I. C. Rep., p. 31."

4 Inters. Com. Rep., p. 355, left col. Board of Trade v. Alabama Midland Ry. Co.

In the Alabama Midland Ry. case, there was no pretense that there was anything "rare" or "peculiar," or "unusual," in the competition between the various railroads which centered at Montgomery. It was conceded that all of said railroads were subject to the Act to Regulate Commerce; and the very question which this Court was asked to decide in that case was whether the competition between those rail lines at Montgomery, all of which were confessedly subject to the Act to Regulate Commerce, could properly be taken into consideration in fixing competitive rates to and from Montgomery.

While there was a question of fact in the Alabama Midland Ry. case as to whether there was any water competition at Montgomery, there was no question of law in that case as to whether water competition could be taken into consideration.

The Commission itself, in one of its earliest cases, had decided

that water competition, and competition between rail carriers *not* subject to the Act to Regulate Commerce could be taken into consideration. It had also decided that competition, even between rail carriers subject to the act, could be taken into consideration "*in rare and peculiar cases.*"

1 Inters. Com. Rep., p. 278, right col., 5th head note. In Re Southern Ry. & S. S. Association.

None of those questions, therefore, were raised in the Alabama Midland Ry. case. The question raised in that case was, whether competition between *rail carriers subject to the act*, could be considered, *where there was nothing* "*rare*," "*unusual*," *or* "*peculiar*" *in it; and where it was in nowise different from other ordinary rail competition.* This Court decided in that case, that if the competition be such as to affect rates, and such as subserves the public interest as well as the interest of competing carriers, it may be taken into consideration, notwithstanding all of the competing rail carriers are subject to the Act to Regulate Commerce, and notwithstanding there be nothing "rare," "unusual," or "peculiar" in the competition.

168 U. S., pp. 144 to 175, I. C. C. v. Alabama Midland Ry. Co.

175 U. S., p. 669, Louisville, etc., R. R. Co. v. Behlmer.

181 U. S., pp. 1, 18, 19, E. T. V. & G. Ry. v. I. C. C.

LXXXIV.

The Contention of Counsel for Appellant that Competition Cannot be Considered Except in Certain Extreme Cases.

Counsel for appellant refers to the fact that certain witnesses testified that at the time the Act to Regulate Commerce was passed, and prior thereto, and since, the greater charge for the shorter than the longer haul, etc., only existed in cases of competition in transportation to the longer distance point; and he argues that, as Congress knew this fact, it did not intend that competition in transportation should be an excuse in *all* cases, but only in certain *extreme* cases, where, "*the interests of the public as well as of the carrier demand it.*"

I concede that Congress did not intend that competition in transportation should be an excuse "in *all* cases."

I also concede that Congress did not intend that competition should be an excuse in any case, except where "the interests of the public as well as of the carrier demand it."

But I contend that where "the interests of the public as well as of the carrier" *do* demand it, Congress *did* intend that competition should be an excuse.

175 U. S., pp. 674, 675, Louisville, etc., R. R. v. Behlmer.
181 U. S., pp. 1, 18, 19, *et seq.*, E. T. V. & G. Ry. Co. v. I. C. C.

I deny that the cases in which competition subserves the interests of the public, as well as of the carriers, are "extreme," "unusual," "rare" or "peculiar." On the contrary, I insist

that the interests of the public are usually subserved by the existence of legitimate competition; and I insist that the competition at Atlanta in this case subserves the interests of the public, as well as of the carriers.

LXXXV.

The Argument that Appellees' Rates are What are Known as "Agreed Rates," and Therefore that They are Not the Result of Competition.

In the Circuit Court, counsel for appellant contended that as all of the lines reaching Atlanta charge the same rates to that point, those rates are what are known as "agreed rates," and therefore, there is no real competition at that point. Or, to state it differently, that instead of there being competition at that point, there is an agreement *not* to compete.

This position is inconsistent with another position taken by counsel, and which is discussed in Section LXXXIV of this argument. In the first position, counsel referred to the fact that certain witnesses testified that at the time the Act to Regulate Commerce was passed, and prior thereto, and since, the greater charge for the shorter than the longer haul *only existed in cases of competition at the longer distance point;* and he argued that, as Congress knew that fact, it did not intend that competition should be an excuse, except in certain *extreme* cases, etc.

In one position, he contends that competition is the sole cause for charging less for a longer than for a shorter distance; and in the other position, he contends that there is no real competition at the longer distance point.

Certain traffic agreements between competing railroad companies were considered by this Court in U. S. v. Trans-Missouri Freight Association, 166 U. S., p. 290; and U. S. v. Joint Traffic Association, 171 U. S. p. 505. The agreements before the Court in those cases were held to be violative of the Anti-Trust Act *because their effect was to increase rates* by stifling competition.

In the case at bar, no complaint would be made of the rates to La Grange, if the rates to the longer distance points could be *increased* so as to be not less than the La Grange rates.

The object of the Traffic Association agreements construed by this Court was to restrain within reasonable limits what the carriers regarded as ruinous competition.

The very fact that such agreements were made, is the best evidence that competition existed; and as the object of such agreements was to restrict that competition, and thereby *increase* the longer distance rates so as to remove the disparity which existed between the longer distance rates, and the shorter distance rates, they would have inured, eventually, to the benefit of the shorter distance points, if Congress had not prohibited them, by the Anti-Trust Act.

In the Georgia Railroad Commission cases, the United States Circuit Court of Appeals, replying to a similar argument made by counsel in those cases, said:

"It is true that with reference to both points, *i. e.*, Atlanta and Opelika, the longer distance points in those cases, the force of this competition has been recognized by the respective appellees, and its influence has, by agreement between them, been so adjusted as to fix the rates to each of these points; but witnesses showing thorough competency to testify to the fact, state that this adjustment of the rates has been brought about and is

maintained by force of the competition bearing upon those points. It is argued by counsel for the appellant that by this agreement as to rates, the carriers have contracted to not compete. But it is not shown or reasonably suggested on what ground or for what consideration the competing carriers consented to accept a lower rate to these longer distance points than they charge to the shorter distance points, if they could just as well have agreed and contracted to charge as great or greater rates to the longer than to the shorter distance points."

93 Fed. Rep., pp. 87, 88, I. C. C. v. W. & A. R. R. et al.

The Commission itself finds and reports, in this case, that "competition at Atlanta has been active for many years."

Trans., p. 32.

And that the competition at Atlanta "includes both the competition of markets for supplying goods to Atlanta, *and the competition of carriers* for the carriage of freight to that point from New Orleans, and from Western, Northern, and Northeastern cities."

Trans., p. 28.

LXXXVI.

The Commission Has No Right to Ignore the Natural Advantages of Any City.

In the Circuit Court, counsel for appellant contended that, inasmuch as the order of the Commission is simply that the rates to La Grange shall not be higher than those to the longer distance points, it may be complied with by giving La Grange rates as high as those to the longer distance points, and that this privilege or option given to carriers to make the rates to La Grange as high as to the longer distance points, "*thus ignoring*

the natural advantage of La Grange in being the shorter distance point, is all that can be asked by the carriers, *and is a reasonable allowance for any dissimilarity of conditions resulting from the competition shown in this case.*"

If the Commission had the legislative power to prescribe rates to be charged in the future, as it at one time claimed to have, I could understand such expressions as "the Commission *ignoring the natural advantages* of La Grange."

With an arbitrary rate-making power at its command, it could, with impunity, ignore the natural, or commercial advantages of any city in the Union, and there would be no practical relief, however capricious its action might be.

But, as the Commission has no legislative power, and must act as a quasi judicial tribunal, what right has it to "ignore the natural advantages" of La Grange?

I have shown in Section LXXI of this argument that if it constitutes unjust preference in favor of the longer distance points to charge less rates to them than to La Grange, it constitutes unjust prejudice against La Grange to charge as high rates to it as to the longer distance points; and that if distance is to be the controlling factor, the rates to La Grange and to the longer distance points, respectively, as well as all other rates, must be constructed *on a mileage basis.*

If La Grange is entitled to have its rates constructed on a mileage basis, neither the Commission, nor the Court, has the right to "ignore its natural advantage," in being the shorter distance point.

But if it be held that La Grange is entitled to have its rates constructed on a mileage basis, every other city and station has

the same right; and all rates in this country must be constructed on that basis.

Neither the Commission, nor the Court, has any more power than a railroad, to subject shorter distance points to *any* unjust prejudice; and if they are entitled to have rates constructed on a mileage basis, the Commission, and the Court, as well as the railroads, should say so, and not "ignore their natural advantage," by subjecting them to rates as high as those to the longer distance points.

When counsel says that the privilege given the carriers to charge to La Grange rates as high as those to the longer distance points, "is a reasonable allowance for any dissimilarity of conditions resulting from the competition shown in this case," he concedes that a dissimilarity of conditions *has* resulted from that competition; and yet he fails to explain why it would be a reasonable allowance for that dissimilarity, to permit the carriers to charge to La Grange rates exactly as high as those to the longer distance points, and yet not one cent higher. It is quite easy to make such assertions, but quite impossible to suggest any intelligible reason in support of them.

In the Georgia Railroad Commission cases, the U. S. Circuit Court of Appeals, in replying to a similar argument of counsel, said: "If the mere charging of a greater rate for the shorter than for the longer haul, gives an undue and unjust preference to the longer distance points, and subjects the shorter distance points to any undue prejudice or disadvantage, it is difficult to see how the charging exactly the same rate for the shorter haul that is charged for the longer shall escape condemnation."

93 Fed. Rep., p. 91, I. C. C. v. W. & A. R. R. et al.
181 U. S., p. 22, I. C. C. v. Clyde S. S. Co.

LXXXVII.

It is Not Fair to Compare Competitive Rates with Non-Competitive Rates.

In the case of I. C. C. v. E. T. V. & G. Ry. Co. et al., Judge Severens said:

"Nevertheless, a reference to the Memphis rate is of value in determining whether the rates to Chattanooga are reasonable rates, it appearing that, though the distance is nearly one-third greater than to Chattanooga from the East, rates are accepted for the Memphis business considerably less than those at Chattanooga."

85 Fed. Rep., pp. 111, 112; reversed, 181 U. S., p. 1.

In that case, Memphis was one of the longer distance points and Chattanooga was the shorter distance point. The Commission held that as there was water competition at Memphis, which created dissimilar circumstances and conditions, the lower rates to Memphis were not violative of the fourth section, and refused relief to Chattanooga, so far as Memphis was concerned. According to Judge Severens, however, though the Commission declined to grant relief under the *fourth* section, it could have used the Memphis rates as evidence that the shorter distance rates to Chattanooga are unreasonable, and could have granted relief to Chattanooga under the *first* section.

In the case of A. T. & S. F. R. R. v. D. & N. O. R. R., 110 U. S., 684, this Court refused to use through rates even as presumptive evidence that local rates were unreasonably high.

If Judge Severens is right, there is no use for either the second, third or fourth sections of the act; because every long and short haul case can be disposed of under the first section. If a disparity of rates constitutes an unjust discrimination, then, according to Judge Severens, the higher rate is unreasonable; and dispensing with the second section, relief may be given under the first section. So, if a disparity of rates constitutes an undue prejudice, then, according to Judge Severens, the higher rate is unreasonable; and dispensing with the third section, relief may be given under the first section. And so, if a greater charge be made for a shorter than for a longer distance, then, according to Judge Severens, the shorter distance rate is unreasonable; and dispensing with the fourth section, relief can be given under the first section.

But according to Mr. Justice Brown:

"A charge may be perfectly reasonable under Section 1, and yet may create an unjust discrimination, or an unreasonable preference, under Sections 2 and 3." And he might have added, with equal propriety, may create a greater charge for a shorter than for a longer distance, under such circumstances as to violate Section 4.

145 U. S., I. C. C. v. B. & O. R. R.

According to Mr. Justice Brown, the first section of the act has a scope of its own, and covers a ground entirely distinct from that covered by either Section 2 or Section 3; and I may add, entirely distinct from that covered by Section 4.

Again, Judge Severens said:

"I think the question of the justness and reasonableness of rates under the first section is colored by the other provisions of the law and by the general policy of the whole enactment, which is to effect the equality of charges."

85 Fed. Rep., p. 114; reversed, 181 U. S., p. 1.

In Section LXXII of this argument I have shown that neither the common law, nor the Act to Regulate Commerce, requires "equality of charges," except where the services *are similar*; and therefore I submit that Judge Severens is in error in referring to "the general policy" of the act as aiming at the "*equality* of charges." I also submit that he is in error in holding that "the first section is colored by the other provisions of the law;" for, as stated above, Mr. Justice Brown holds that the first section has a scope of its own, which is distinct from that of any of the other provisions of the law.

Again: In the case of I. C. C. v. E. T. V. & G. Ry. Co. et al., Judge Severens said:

"The question whether the rates are just and reasonable in themselves is in some measure a relative one; that is to say, it may be tested by a comparison of the particular rates with those accepted elsewhere for a *similar* service, etc."

85 Fed. Rep., p. 114; reversed, 181 U. S., p. 1.

I agree to that proposition, provided due importance be given to the word "similar."

Again Judge Severens said:

"It seems to me clear, that the charges accepted for the longer haul may be referred to for the purpose of considering the reasonableness of the charges made for the shorter haul."

85 Fed. Rep. p. 114; reversed, 181 U. S., p. 1.

I agree to that proposition also, provided the service performed in the case of the longer haul be "*similar*" to the service performed in the case of the shorter haul. It is difficult, however, to imagine a case where a carrier would charge less for a long than a short haul, unless the circumstances and conditions of the two hauls were substantially *dis*similar.

Again: In the case of I. C. C. v. E. T. V. & G. Ry. Co. et al., Judge Severens said:

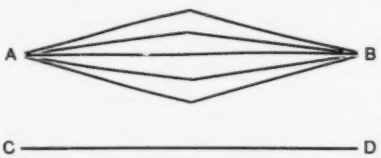
"Such comparisons are applied to every other kind of business, and the fact that there may be competition in such business would not be a controlling consideration, *for the presumption would always* be that the compensation charged for the service or thing is sufficient to be *reasonable*."

85 Fed Rep., p. 115; reversed, 181 U. S., p. 1.

Again he said:

"If, as I gather from the testimony, the through rates to Nashville afford a *fair* profit to the carriers, whether the Northern trunk lines, or the respondents (*and it is reasonable to suppose they would not engage in the business without it*), there is substantial ground for contending that the same charge for carrying freight from the East to Chattanooga, would afford a reasonable profit, and would therefore be a reasonable charge."

83 Fed. Rep., p. 115; reversed, 181 U. S., p. 1.



I agree that if the competition from A to B in the above diagram be substantially similar to the conpetition from C to D, then the rates charged from A to B may fairly be compared with the rates charged from C to D. But if there be severe competition existing from A to B, and no competition existing from C to D, then I deny that any fair comparison can be made between the rates from A to B and those from C to D.

Suppose it should be shown that merchants are constantly in the habit of selling salt, domestics and other staple articles at one per cent profit. It would be perfectly fair to compare the rates charged by one merchant upon *those* articles with the rates charged by another merchant *in the same town* upon the *same articles;* for it would be right to assume that if, for any reason, one merchant could afford to sell those articles at a certain profit, another merchant in the same town could afford to sell them at the same profit; and the fact that the profits of both merchants on those articles were controlled by competition would not alter the case. But would it be fair to compare the profit which those merchants accepted on salt, domestics, etc., with their profit on fancy imported articles, and foreign dress goods? *In a word, it is fair to compare compe'itive rates with competitive rates; and it is fair to compare noncompetitive rates with noncompetitive rates; but it is not fair to compare competitive rates with noncompetitive rates.*

When Judge Severens says that:

"The presumption would always be that the compensation charged for the service or thing is sufficient to be *reasonable;*" and when he says that the presumption is that through rates to longer distance points "afford a *fair* profit" or the carriers would not engage in the business; the correctness of his proposition depends entirely upon the meaning to be given to the words "reasonable and "fair."

It may be said that a profit of one per cent on salt, domestics and other staple articles is a "reasonable" and "fair" profit on those articles, or the merchants "would not engage in the business." And the profit *is* in fact "fair" and "reasonable;" provided the merchant be allowed to charge higher profits upon fancy imported articles, dress goods, etc. A merchant is compelled to carry certain staple articles in stock in order to draw customers for his higher priced goods; and he can "fairly" and

"reasonably" accept extremely low rates of profit upon his staple goods, rather than deplete his stock of such articles, and thereby drive away his custom. But if by the words "fair" and "reasonable," Judge Severens means that because a merchant accepts one per cent profit upon staple articles, the presumption is that it is a fair and reasonable profit to be charged *upon all other articles sold by him;* and that he ought not to be allowed to exceed that profit upon any other article; then I respectfully dissent from his proposition. Any such rule of law administered in a case where a merchant was suing for articles sold and delivered, and no price had been previously stipulated, would destroy the mercantile business of this country. No court would think of charging a jury in a suit brought by a merchant to recover for the value of an imported lace shawl sold by him, that the jurors must, in ascertaining its value, restrict the merchant to the same rate of profit upon the shawl as that which he accepts on domestics, and other staple articles. The proposition of Judge Severens, referred to in the last preceding section of this argument, is plausible, and apparently logical, but in reality sophistical.

It may be put in syllogistic form, as follows:

1. Rates charged by a carrier to the longer distance point (Atlanta) must be reasonably high, or the carrier would not accept them.

2. The rates charged by the appellees to La Grange, the shorter distance point, are higher than the rates charged by them to the longer distance point.

3. Therefore, the rates charged by them to La Grange are *unreasonably* high.

The fault in the syllogism is to be found in the major pre-

mise. And it consists in stating a fact as being true under all circumstances, which, though it may be true under certain circumstances, is not true under other circumstances, and is not true under the circumstances of the particular case, in which the syllogism is invoked.

A similarly faulty syllogism would be the following:

1. Men are black.

2. George Washington was a man.

3. Therefore George Washington was black.

If a railroad has no competition to contend with, its own interests will induce it to charge according to distance.

In that case, rates charged by it to a longer distance point may properly be presumed to be reasonably high; and in that case, the major premise of the Commission's syllogism would be true.

But where severe competition exists at the longer distance point, whether the competition be between market and market, or between product and product, or between carrier and carrier, the presumption instead of being that the rates to that point are reasonably high, is that they are reasonably, or perhaps *un*reasonably *low*.

In the case of Smyth et al. v. Ames et al., this Court quoted the following from Justice Brewer:

"It must be remembered that these roads are competing roads; *that competition tends to a reduction of rates*—sometimes as the history of the country has shown, *below that which affords any remuneration to those who own the property.*"

Smyth et al. v. Ames et al., 169 U. S., p. 542.

LXXXVIII.

If Competitive Rates Are to be Used as a Standard for Fixing Noncompetitive Rates, the Rates on Low Class Traffic Will Have to be Used as a Standard for Fixing Rates on High Class Traffic.

If the low rates which prevail at competitive points are to be used as a standard for fixing the rates to noncompetitive points, the rates on low-class traffic will have to be used as a standard for fixing rates on high-class traffic.

To illustrate my meaning: The first-class rate from New Orleans to Atlanta is $1.03 per hundred pounds; while the rate on Class D from New Orleans to Atlanta is only 20 cents per hundred pounds; thus showing a difference of 83 cents per hundred pounds in favor of Class D, as against Class 1, from New Orleans to Atlanta.

Trans., p. 35.

Now, if the low competitive rates from New Orleans to Atlanta are to be used as a standard for fixing noncompetitive rates from New Orleans to La Grange, why is it that the low rates to Atlanta on Class D are not to be used as a standard for fixing the rates to Atlanta on Class 1? Why cannot the argument be made, that if railroad companies have, for a long series of years, carried traffic known as Class D from New Orleans to Atlanta for 20 cents per hundred pounds, the presumption is that it has afforded them "a fair profit," or "they would not engage in the business;" and if 20 cents per hundred pounds affords "a fair profit" for carrying Class D from New Orleans to

Atlanta, the higher rate charged by them from New Orleans to Atlanta upon Class 1 must be unreasonably high. And yet, if any one should seriously contend that the carriers of this country ought to be compelled to charge on the lower classes of traffic as high rates as are charged on the higher classes, the contention would be regarded as preposterous.

It is certain, however, that precisely the same fact which compels carriers to accept exceedingly low rates to *all* points on the *lower* classes of traffic, compels them to accept exceedingly low rates to *competitive* points on *all* classes of traffic; and the sole compelling fact in both cases is competition. The reason why low-class traffic can only pay very low rates is because of competition between *product and product.*

Class D embraces grain, hay, etc. Those articles shipped from New Orleans to Atlanta come in competition at Atlanta with the same articles shipped from Memphis, Louisville, Cincinnati, etc.; and therefore those articles, if shipped from New Orleans, must be carried at a sufficiently low rate to enable them to compete in Atlanta with the same articles that are shipped from other markets.

In a word, the only reason why exceedingly low rates are charged upon the *lower* classes of traffic is that *competition* between *product and product* compels it; the only reason why rates to Atlanta on *all* classes of traffic are less than rates to La Grange, is that the competition between railroad and railroad, and between market and market, which exists at Atlanta, but does not exist at La Grange, compels it. If competition is to have the effect to reduce local rates to the level of competitive rates, it should also have the effect to reduce the rates on high-class traffic to the level of the low-class rates.

LXXXIX.

Railroad Officials Do Not "Have Everything Their Own Way" in Making Rates.

In the case of I. C. C. v. E. T. V. & G. Ry. Co. et al., Judge Severens said:

"But it is to be remembered that the railroad business of the country is conducted by able men, animated, as it is right to suppose, with the desire to promote the interests of those whom they serve. Further, to promote the efficiency of their work, the officers of the various companies have their associations for the purpose of comparing, studying and adjusting the rates of traffic on their several lines. *In the absence of the other party, they have everything their own way.* It would be expecting something not encountered or expected in other branches of business if we anticipated that they would assume a judicial attitude towards those with whom their business is to be done."

85 Fed. Rep., p. 112; reversed, 181 U. S., p. 1.

Judge Severens is correct in saying that railroad traffic managers are animated with a desire to promote the interests of those whom they serve. But experience has taught them that the most effective way to promote those interests, is to promote the interests of the patrons of their roads. This is not attributing to railroad officials any charitable or benevolent motive. On the contrary, it is conceding that they are intelligently selfish.

The error of Judge Severens consists in the statement that railroad traffic managers in studying and adjusting the rates of traffic on their several lines act "in the absence of the other

party," and that "they have everything their own way." The error is quite a popular one, and it grows out of a want of familiarity with the practical method of rate-making in this country. *At the present day, it cannot be said that railroad traffic managers make their rates at all.*

So far as rates to and from *competitive* points are concerned, they are fixed inexorably, and absolutely, by competition. A traffic manager has nothing to do but to ascertain the rates which his rivals are offering to accept, and adopt, or closely approximate those rates, or abandon the competitive traffic.

As to rates to and from local stations, a railroad traffic manager, in many of the States, is restricted by State railroad commissions; and in all of the States he is restricted by competition between product and product, and between market and market. Those kinds of competition have a controlling influence upon the rates that can be charged to and from even the most strictly local stations on a road. To illustrate: Cotton is raised on the line of the Atlanta & West Point Railroad, and it is shipped from many of the local stations on that road. But that cotton is raised and shipped in competition with cotton raised upon other railroads. The traffic manager of the Atlanta & West Point Railroad must accept such rates on cotton from its local stations as will enable that cotton to be carried and sold in the markets of the world, in competition with cotton raised upon the lines of other railroads, or the cotton cannot be moved at all. In that event the Atlanta & West Point Railroad will lose the revenue that it might otherwise realize from the transportation of cotton from its local stations.

Again: If the cost of producing cotton, added to a certain rate charged for transportation, exceeds the price which can be

obtained for cotton in the market, the cotton will not move from the local stations; and in that event also, the Atlanta & West Point Railroad will lose the revenue which it might otherwise realize from its transportation. It is necessary, therefore, that the traffic manager acquaint himself, not only with the rates which other railroads are accepting for the transportation of cotton, for similar distances, but also with the cost of producing cotton, and with the price at which it is selling; and this he cannot do, without full consultation with the farmer who raises the cotton, and the merchant who buys it. The same is equally true of corn, wheat, and other grain, of live stock, and in fact, of everything produced along the line of a railroad and shipped from its local stations. Whenever any of those products are offered for shipment at a local station, they are offered with a full knowledge that their transportation must be conducted in competition with the transportation by other railroads of similar products, destined to common or competing markets; and such competition is as controlling, though not in the same degree, as that which exists at those cities where numerous rival lines of railroad intersect.

The Commission, in speaking of classifications made by railroad associations, says:

"But in these associations, when in session for the making of rates, each railroad official has, to some extent, had the district which was served by his road behind him; he has felt the pressure of the interests there, and contended for them as against the interests in classification represented by others, not only because it was desirable that the roads should favor the policy its patrons favored, but also *because the same policy was likely to be beneficial to both.*

"The result necessarily is that a classification made by a rail-

road association represents a series of compromises, *to which not only the railroads are parties, but in a certain sense business interests and sections of country also; these in many cases being admitted by their representatives to the consultations upon a subject so vitally concerning their interests, and allowed to present their views.*"

1 Ann. Rep., I. C. C. (1887), p. 31.

In an extract from Senate Report No. 1394, Finance Committee, second session, Fifty-third Congress, published by the Government under the title "Wholesale Prices, Wages and Transportation," it is said that:

"These are the general rules under which classifications are constructed, and while to a large extent controlling, classifications are, notwithstanding, in a great measure a series of compromises, the participants of which are not alone the railroads, but also the shippers and representatives of business interests throughout the country, the latter being afforded ample opportunity to join with the railroads in the discussion as to the proper classification of articles of shipment affecting their interests."

Wholesale Prices, Wages and Transportation, p. 404.

Judge Severens is therefore in error, when he states that traffic officers in "studying and adjusting the rates of traffic on their several lines," act "in the absence of the other party, and have everything their own way."

XC.

Railroads Do Not and Cannot Even Up Their Profits by Overcharging at Local Stations.

Counsel for appellant, in the Circuit Court, quoted a portion of the following extract from the opinion of Judge Severens, in the case of Interstate Commerce Commission v. E. T. V. & G. Ry. Co. et al.:

"If railway carriers engage in a competitive struggle for business at a place where they meet and underbid each other, or other carriers, to a point which is not in itself remunerative, can they turn back on the line, and taking advantage of the conditions existing at other localities, arising either from the fact that there is no opportunity for competition, or from the fact that by concert of the carriers there is none, charge such rates for the shorter haul as shall make good their lack of profit in competitive business, and even up the profit on their whole business to the point they set before themselves as reasonable? To the proposition thus roundly stated, no doubt counsel for the carriers would say that they could not contend for it, and yet this is the result reached by the not very indirect steps of the argument."

85 Fed. Rep., p. 115; reversed 181 U. S., p. 1.

I respectfully deny that the argument of "counsel for the carriers" either directly or indirectly leads to any such proposition as the Judge stated so "roundly."

I have heretofore shown that the Atlanta rates yield some profit (though it may be very small) over the additional cost of the movement of the Atlanta traffic. The appellee carriers in

this case, therefore, do not "engage in a competitive struggle" . . . "to a point which is not in itself remunerative." If the rates accepted to Atlanta yield *any* profit over the additional cost of the movement of that traffic, they are "remunerative" to some extent, though the remuneration may be very small.

181 U. S., pp. 18-19, E. T. V. & G. Ry. Co. v. I. C. C.

I have heretofore shown that the La Grange rates are just and reasonable in and of themselves. Now, if the La Grange rates be just and reasonable, how can it be truthfully said that the appellee carriers "turn back on the line" and "take advantage" of the conditions existing at that point?

If the rates charged by the carriers to Atlanta are remunerative to any extent, however small it may be, there is no "loss" sustained by the carriers in the transportation of the Atlanta traffic; and therefore there is no occasion for them to "even up," by increasing their shorter distance rates.

181 U. S., pp. 18-19, E. T. V. & G. Ry. Co. v. I. C. C.

If Judge Severens means that railroads must charge at competitive points, the same rate of profit as is charged at noncompetitive points, then they must abandon competitive traffic altogether. If he means that railroads must accept upon noncompetitive traffic whatever rate of profit they may be forced to accept upon competitive traffic, then the Southern railroads must go into bankruptcy; because they can no more afford to carry all of their traffic at the low rate of profit which they are forced to accept at competitive points, than a merchant can afford to sell his entire line of goods at the same rate of profit which he is forced to accept upon certain staple articles.

XCI.

Appellant's Argument that the Atlanta Rates are Unreasonably Low.

Counsel for appellant may contend: "That the rates to Atlanta are unreasonably low, because they do not pay operating expenses, and, in addition, interest on bonds, other fixed charges, and dividends; and therefore that part of these burdens which should be borne by Atlanta traffic are placed upon traffic to La Grange, and other localities treated as noncompetitive or local stations – *thus rendering the La Grange rates excessive in themselves.*"

It is true that the rates to Atlanta do not pay their full proportion of "operating expenses;" that they do not pay anything toward "interest upon bonds," and other "fixed charges;" and, of course, it is true, that they do not pay anything toward reasonable "dividends."

It is also true that the Atlanta traffic ought to pay, provided it could be compelled to do so, its full proportion not only of "operating expenses," but also of "interest," other "fixed charges," and "dividends."

It is also true that to the extent that the Atlanta traffic fails to pay its full proportion of "operating expenses," "interest," other "fixed charges," and "dividends," those burdens have to be placed upon traffic to La Grange and other noncompetitive stations; *or they have to be borne by the stockholders of the company.* And such burdens upon stockholders have been so great

in Southern territory as to cause the utter bankruptcy of many railroad companies. I have shown in Section LXXXIX that there are many reasons why the rates to La Grange and other noncompetitive stations cannot be increased to such an extent as to render them "excessive in themselves."

If then, the La Grange rates are not "excessive in themselves," the question arises whether the Atlanta rates are illegal, merely because competition at that point has reduced them so low that while they pay something more than "the additional cost of movement" of the Atlanta traffic, they cannot be made high enough to pay their fair proportion of "operating expenses," "interest" on bonds, other "fixed charges," and "dividends."

The proposition for which counsel may contend can be put in syllogistic form, as follows:

1. Rates charged to longer distance competitive points do *not* yield reasonable compensation for the service performed by the carrier.

2. The loss sustained by the carrier on traffic to longer distance competitive points is made up by increasing the rates to shorter distance points.

3. Therefore carriers ought not to be allowed to charge less for a longer, than for a shorter distance, over the same line, in the same direction, etc.

The first fault in this syllogism is to be found in the major premise; and it is the fault of indefiniteness. How are we to decide what is a "*reasonable*" compensation for transportation to a *competitive* point.

My contention is, that if *competitive* rates will pay anything over and above "*the additional cost of movement*" of the competitive traffic, it is right and *reasonable* that they be accepted by the carrier, rather than abandon the competitive traffic.

181 U. S., pp. 18–19, E. T. V. & G. Ry. Co. v. I. C. C.

On the other hand, counsel for appellant may contend that *competitive* rates ought to be sufficient to pay not only the "*additional cost of the movement*," of the competitive traffic, but also the full proportion of that traffic toward "operating expenses," "interest," and other "fixed charges," and "dividends."

Counsel's proposed method of rate construction is correct in theory; and it would be followed by every railroad traffic manager in the country, if it were practicable to do so. But the utter impracticability of constructing rates upon the theory contended for by counsel was demonstrated by the Commission itself, in 1887, In Re Southern Railway & Steamship Association (sometimes cited as In Re Louisville & Nashville Railroad Company). In that case, the Commission said:

"This distinction between *the cost of movement* and *the fixed charges* often becomes of importance in such cases as that of the lumber trade just mentioned. That trade is new; the roads which take it were built without anticipating its springing up, and their managers made their calculation for business to meet the whole cost of operation in reliance upon such traffic as was then apparent or probable. The *fixed charges* of the road may, for purposes of illustration, be assumed to equal one-half of the whole, *the cost of movement* of freight the other half. The rates laid were doubtless calculated to cover the whole, with a margin of profit, and were so laid that all traffic would contribute toward both *fixed charges* and *cost of movement*. But now

comes this new business, and from the nature of the case low rates are a necessity to it; it can pay perhaps little if anything more than half what is paid by other traffic. But taking it will not increase perceptibly *the fixed charges* of the road, because those are made up of the items that must be paid whether the traffic is large or small. What is added to the cost by taking it *is simply the expense of its own handling and movement;* and upon the supposition made, there might perhaps be gain to the road instead of loss, in taking it at anything above half the rates which are levied upon other traffic corresponding to its classification. *It might, therefore, be carried at such rates without wrong to any one.*"

1 Interstate Commerce Rep., p. 284, right col., In Re Southern Ry. & S. S. Association.

What is said by the Commission in reference to the lumber trade, is equally applicable to all the lower kinds of freight, such as iron ore, stone, sand, brick, cement, pig iron, etc. If the courts once hold that each and every kind of traffic must be charged such rates as will pay not only the "additional expense incurred" by the carrier in the transportation of that particular kind, but also the full proportion which such traffic ought to contribute toward all the "operating expenses," "interest," other "fixed charges," and "dividends," then *the courts will put an absolute embargo upon two-thirds of the tonnage now carried by the railroads of this country.*

The Commission in its First Annual Report to Congress said:

"It was very early in the history of railroads perceived that if these agencies of commerce were to accomplish the greatest practicable good, the charges for the transportation of different articles of freight could not be apportioned among such articles

by reference to the cost of transporting them severally, for this, if the apportionment of cost were possible, would restrict within very narrow limits the commerce in articles whose bulk or weight was large as compared with their value. On the system of apportioning the charges strictly to the cost, some kinds of commerce which have been very useful to the country, and have tended greatly to bring its different sections into more intimate business and social relations, could never have grown to any considerable magnitude, and in some cases could not have existed at all, for the simple reason that the value at the place of delivery would not equal the purchase price with the transportation added"

See First Annual Report Interstate Commerce Commission (1887), p. 30.

What is said by the Commission with reference to the impracticability of apportioning the charges for the transportation of different articles of freight among such articles by reference to the cost of transporting them severally, is equally applicable to the theory that the charges for the transportation of competitive and noncompetitive freight ought to be apportioned between them by reference to the cost of transporting them, severally. The reason why low-grade traffic cannot be made to pay in proportion to the cost of its transportation, is, as the Commission properly states, because the charge for carriage would be greater than it could bear. And the reason why *competitive* traffic cannot be made to pay in proportion to the cost of transporting it, is because the charge for carriage upon that basis by the longer line would ordinarily be greater than by the shorter line; the longer line would, therefore, be driven out of competition; the shorter line would secure a monopoly, and all competition would be destroyed.

The second fault in the syllogism is to be found in the minor premise. In that premise it is erroneously assumed that a *loss* is sustained by the Atlanta & West Point Railroad Company on the Atlanta traffic. But if the Atlanta rates pay anything over and above the "additional cost of movement," so far from there being any *loss* to the Atlanta & West Point Railroad Company on the Atlanta traffic, there is a "margin of *profit*" *in carrying that traffic.* In other words, *there is no loss at all.*

181 U. S., pp. 18, 19, E. T. V. & G. Ry. Co. v. I. C. C.

The real ground of counsel's objection is, that the margin of profit is not as great as it should be; and the answer to the objection is, that the profit, however small it may be, which that company may derive from the Atlanta traffic, enables it to improve and increase its facilities for handling the La Grange traffic, as well as the other traffic on its line.

The third and greatest fault in said syllogism is to be found in the conclusion which is sought to be drawn from the major and minor premises.

If it be true that rates charged to longer distance competitive points do not yield proper compensation; and if it be true that their failure to do so causes a loss to the carrier, it is manifest that if the rates to the shorter distance points be reduced to the same as the rates to the longer distance points, *the loss to the carrier will be increased, instead of being diminished.* In other words, if the courts compel carriers in the Southern territory to accept to their noncompetitive stations rates as low as those which competition compels them to accept to longer distance competitive points, the result must be a disastrous loss of revenue to the Southern railway system.

In the case at bar, the loss to the Atlanta & West Point Railroad would amount to $63,331.56 per annum.

Trans., p. 90.

In the Georgia Railroad Commission cases, the following language was used by the U. S. Circuit Court of Appeals:

"There may be a wide difference between a rate or amount of compensation that would give full remuneration for the service in carrying the competitive traffic, and that remuneration therefor which competitive conditions will allow the carrier to receive. The full measure of reasonable remuneration to the appellees for the carriage of competitive freight to Atlanta would require a rate sufficient to pay not only the additional cost of moving the competitive traffic, but also that proportion of operating expenses, fixed charges, and reasonable profit to the owners of the carrier lines which the tonnage of the competitive traffic bears to the total freight tonnage of the carrier. And that rate would, doubtless, be applied and enforced if the circumstances and conditions permitted it to be done. But as no higher rate than a full compensatory one should be applied and enforced under the most favorable circumstances and conditions, it is manifest that it cannot be applied to traffic that is subject to severe competitive conditions."

I. C. C. v. W. & A. R. R. Co. et al., 93 Fed. Rep., p. 90.

XCII.

It is Impossible to Increase the Atlanta Rates Without Stifling the Competition that Has Existed There for Many Years.

Suppose it be conceded "that the Atlanta rates are unreasonably low," in the sense that they do not pay, in addition to "cost of movement," their full proportion of "operating expenses," "interest," other "fixed charges," and "dividends," how is it to be remedied except by stifling the competition, which has reduced those rates to their present level?

If all the railroads at Atlanta were to agree to cease their competition at that point, the Atlanta rates from New Orleans would, in all probability, become higher than the La Grange rates; but would such an agreement be lawful?

The fifth section of the Act to Regulate Commerce expressly prohibits every contract, agreement, or combination for pooling; and pooling was prohibited because it was supposed to have a tendency to stifle competition.

In the case of Ex Parte Koehler, Judge Deady said:

"The places between which competition in transportation exists between water craft and railways, *or even the latter*, always will, and must, send and receive freight at lower rates than others not so favored."

31 Fed. Rep., p. 321, Ex Parte Koehler.

Now, if it be true that places between which competition in

transportation exists always will, and must, send and receive freight at lower rates than others not so favored, it is impossible to prevent such competitive rates from becoming so low, that in many instances, while they may pay more than the "additional cost of movement," they will not pay anything toward "interest," other "fixed charges," and "dividends,"—unless the carriers enter into a contract, combination or conspiracy to limit or stifle the competition,—a thing which they are forbidden by law to do.

XCIII.

The Law Does Not Prohibit the Acceptance of Rates that Are "Unreasonably Low in Themselves."

Suppose it be conceded that the Atlanta rates are "unreasonably low," in the sense that they do not pay, in addition to "cost of movement," their full proportion of "operating expenses," "interest," other "fixed charges," and "dividends," what provision of law is violated by accepting them?

The first section of the Act to Regulate Commerce, provides that all charges, etc., "shall be reasonable and just." If the word "reasonable" had been construed to mean reasonably high, as well as reasonably low, then it would have been unlawful to accept rates which are "unreasonably low." The Commission, however, has held that the word "reasonable," as used in the first section in reference to rates, means reasonably low, *but not reasonably high;* and that the Commission has no power to order competitive rates to be advanced, even where they are so low "that persistence in making them would be ruinous."

In construing the word "reasonable," as used in the first section, the Commission said:

"There is consequently no little force in the claim made by respondent that charges are not reasonable and just, when they are so low as to be unremunerative to the carrier—so low that its action in continuing to make them would lead directly to bankruptcy. Possibly, if the statute were to be interpreted without any aid from its history, and with no other knowledge of its purpose, aims and ends than such as may be derived from its provisions, a holding that a rate unreasonably low was forbidden might be justified, or at least might be urged upon plausible argument.

"But every statute is to be read in the light of its history and of the evils it was intended to redress."

"After discussing the history of the statute and its purposes, the Commission said:

"If such was the primary purpose of the statute, as unquestionably it was, then the proper meaning of the term 'just and reasonable,' as employed in it, is apparent. They were employed to establish a *maximum* limitation for the protection of the public, *not a minimum limitation* for the protection of reckless carriers against their own action."

2. I. C. Rep., pp. 146, 147, In Re C. St. P. & K. C. R. Co.

The fact, therefore, that the Atlanta rates may be "unreasonably low in themselves," in the sense above referred to, constitutes no violation of the first section of the act; and it constitutes no violation of the third or fourth sections, unless it can also be shown that the La Grange rates are unreasonably *high*, in themselves."

I have heretofore shown that the La Grange rates are *not* unreasonably high; but on the contrary are reasonably low.

XCIV.

A Large Proportion of the Traffic of the Country is Necessarily Carried at Rates which Do Not Pay Anything Toward "Interest," Other "Fixed Charges," or "Dividends."

It is stated by the Commission that the railroad classifications now in use in this country embrace from five thousand to seven thousand items.

11 Ann. Rep., I. C. C. (1897), p. 66.

The classification which is used by the Georgia Railroad Commission divides those five thousand or seven thousand items into twenty-two classes, and designates the first fourteen of them as classes 1, 2, 3, 4, 5, 6, A, B, C, D, E, F, G, H.

The Georgia Railroad Commission is authorized by the laws of that State to fix reasonable maximum railroad rates; and in pursuance of that authority, it has established a "Standard Freight Tariff," a copy of which, so far as it relates to the first fourteen classes, has been filed in this case as evidence for the appellant.

Trans., pp. 245, 246.

By reference to said tariff it will be seen that for a distance of 300 miles, the rate on class 1 is fixed at 80 cents per hundred pounds; while the rate on class G is fixed at only 11 cents per hundred pounds. In other words, the rate on class 1 is more than seven times as much, per hundred pounds, as the rate on

class G, notwithstanding both of those classes of freight may be carried for the same distance, over the same railroad, in the same train, and even in the same car.

If it be held that a rate is unlawful, because it is unreasonably *low*, in the sense that it fails to pay "interest," other "fixed charges," and "dividends," it must be held that a rate is unlawful, as being unreasonably *high*, because it pays more than "interest," other "fixed charges," and "dividends."

If the Georgia Railroad Commission rate on class 1 pays more than "cost of movement," "interest," other "fixed charges," and "dividends," I suppose it is to be held to be unlawful, because it is unreasonably *high*. But if the rate on class 1 pays no more than "cost of movement," "interest," other "fixed charges," and "dividends," it is manifest that the rate on class G, which is less than one-seventh of the rate on class 1, must fall very far short of paying "interest," other "fixed charges," and "dividends," in addition to the "cost of movement," and I suppose that it must, for that reason, be held to be unlawful, because it is unreasonably *low*.

By reference to the "Standard Freight Tariff" it will be seen that the rates on classes 4 and H are the same; and that the rates on classes 6, A and B are the same; but, with those exceptions, the rates on no two of the remaining classes are the same. Are we to assume that each and every rate on the remaining classes is unlawful because it pays either more or less than the cost of movement, interest, other fixed charges and dividends?

Under the Georgia Railroad Commission Classification, class 1 may embrace dry goods; while class G may embrace cotton seed and its products. In fixing the rates upon dry goods, and

cotton-seed products, respectively, the Georgia Railroad Commission did not give the slighest consideration to the question as to whether the rates either upon dry goods, or cotton-seed products, paid more or less than the "cost of movement," "interest," other "fixed charges," and "dividends." The Commission had sufficient intelligence to know that it is an utter impossibility to ascertain exactly what any particular rate pays; and therefore, instead of trying to construct a tariff upon an impracticable and theoretical basis, it undertook to construct one upon a practicable, common sense, commercial basis. It knew that it does not cost a railroad company materially more to carry one hundred pounds of dry goods, than it costs to carry one hundred pounds of cotton-seed products, a distance of three hundred miles. It knew that cotton-seed products could not be moved at all, if they were charged such rates per hundred pounds, as would be perfectly fair and reasonable for the transportation of dry goods an equal distance; and, therefore, with an utter disregard of the element of cost, the Commission fixed the rate upon cotton-seed products at less than one-seventh of the rate which it allowed upon dry goods. It said to the railroads in effect: You must carry cotton-seed products, at a rate which may fall far short of paying the "cost of movement," together with "interest," "fixed charges," and "dividends; but I will allow you to charge upon dry goods a rate which will probably pay very much more than the "cost of movement," together with "interest," other "fixed charges," and "dividends." If you carry the farmer's cotton-seed products, at less than cost, he can very well afford to pay you much more than cost, for the transportation of such dry goods as may be used by himself and his family.

The Standard Freight Tariff of the Georgia Railroad Commission is constructed upon the same principle as that which governs the Railroad Commissions of other States, and which had

been employed by railroad traffic managers long before any State Railroad Commissions were created. They may differ in their classifications; and they may differ as to the rates assigned to the different classes; but all freight tariffs are based upon commercial considerations,—without attempting to ascertain or consider the relative cost of moving the various articles assigned to the different classes.

Where severe competition exists, as at Atlanta, it is impossible for carriers to be controlled, either by the relative cost, or the relative value of the service; because each carrier must accept *the* lowest rate offered by any one of the competing lines, or all, except one, must abandon the competitive traffic.

If it be held that it is unlawful for carriers to accept competitive rates which do not pay "interest," other "fixed charges," and "dividends," in addition to cost of movement, it will as certainly prevent the carriage of competitive traffic, as the application of the same principle will prevent the transportation of low grade traffic, which probably constitutes two-thirds of the railroad tonnage of this country.

XCV.

If Competition Cannot Justify Competitive Rates which are Not Fully Remunerative, Competition Will Have to be Abandoned Altogether.

It was said by the U. S. Circuit Court of Appeals in the Georgia Railroad Commission cases that:

"As no higher rate than a full compensatory one should be applied and enforced under the most favorable circumstances

and conditions, it is manifest that it cannot be applied to traffic that is subject to severe competitive conditions."

I. C. C. v. W. & A. R. R. Co. et al., 93 Fed. Rep., p. 90.

To paraphrase the language of this Court, just quoted, it is manifest that rates, such as the La Grange rates, cannot be applied to traffic that is subject to severe competitive conditions, as is the Atlanta traffic.

The local traffic of a railroad is the only traffic upon which it can rely, with any degree of certainty, to yield the revenue necessary to pay operating expenses, and a fair return upon the value of that which it employs for the public convenience. A railroad company has the right to so adjust its local rates as that, in connection with such revenue as it may be able to secure from competitive traffic, they will pay operating expenses, fixed charges, and a fair return upon the value of the investment. Such local rates are no more than fairly compensatory, and therefore they are not unreasonably high in themselves. A basis of local rates so adjusted is always higher per ton per mile than can be obtained upon traffic that is subject to severe competitive conditions; and if carriers are to be prohibited from accepting less rates on severely competitive traffic than they are compelled to charge upon their local traffic, they must necessarily abandon the competitive traffic—and whenever they do so, railroad competition in this country will, of course, be at an end.

XCVI.

The Misapplication by Counsel of the "Nebraska Maximum Rate Case."

Counsel for appellant in the Circuit Court quoted the following from the opinion of this Court in Smyth v. Ames, 169 U. S., p. 541, known as the "Nebraska Maximum Rate Case:"

"Nor can the carrier justify unreasonable high rates on domestic business, upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business."

If the word "local" be substituted for the word "domestic," and the word "competitive" be substituted for the word "interstate," the application, which counsel desires to make of the language quoted, will be obvious.

The quotation, however, has no application, because in the case at bar, the appellees do not seek to justify "unreasonably high rates" on their local business. They insist that the La Grange rates are not "unreasonably high." They also insist that the Atlanta traffic is not carried at "*a loss.*" The uncontradicted testimony in this case is, that Atlanta traffic pays something more than the cost of its movement; a fact which demonstrates that instead of its being carried at a *loss*, it is carried at a profit, though the profit may be very small. The appellees, therefore, have no occasion to justify the La Grange rates upon the ground that they are necessary to meet *losses* incurred by reason of their acceptance of the Atlanta rates.

XCVII.

The Atlanta Rates are Lawful Notwithstanding Higher Rates Might be Charged to Atlanta, if Competition at That Point Would Permit.

The Atlanta rates are fixed absolutely by competition, which prevents the appellees from securing at that point rates which are fully compensatory. And the question recurs, though in a slightly different form, whether competitive rates are unreasonably low, within the purview of the law, simply because higher rates might reasonably be charged, if competition would permit.

In the language of the U. S. Circuit Court of Appeals:

"What is a reasonable action or a reasonably remunerative rate for carriage at a given time and place necessarily has relation to the circumstances and conditions bearing upon the actor or upon the carrier at the time and place."

93 Fed. Rep., p. 91, I. C. C. v. W. & A. R. R. Co. et al.

The circumstances and conditions bearing upon the carriers at Atlanta compel them to accept rates, which, while they do not pay anything toward "interest," other "fixed charges," or "dividends," do pay more than the cost of movement of the Atlanta traffic; and therefore yield some profit, though it may be very small. I contend that such rates, so forced upon the carriers by competition, are reasonable, within the purview of the law, notwithstanding very much higher rates would also be reasonable, if the circumstances and conditions at Atlanta were such that the carriers could obtain higher rates than those which they now ac

cept. The error of counsel for the appellant consists in supposing that in order for a rate to be reasonable, it must be represented by some fixed and invariable amount; whereas the truth is that the amount of a reasonable rate not only may, but should, vary with the circumstances and conditions under which it is charged, or accepted.

XCVIII.

Competitive Rates May be Reasonably High, and Yet the Competition which Forces Their Acceptance May Justify a Lesser Charge for the Longer Haul.

Counsel for appellant, in the Circuit Court, contended that:

"If the rates to competitive points are reasonably high, notwithstanding competition, then competition is no justification for a greater charge for the shorter haul."

Competition is not relied on in this case as a justification for a greater charge for the shorter haul to La Grange. It is relied upon as a justification of a lesser charge for the longer haul to Atlanta.

Rates to competitive points may be reasonably high, considering the competitive circumstances and conditions under which they are accepted, and yet they may be so low as not to be *fully* compensatory, though they may yield *some* profit over and above the additional cost of the movement of the competitive traffic. In such a case I contend that the competition, which forces the acceptance of rates which, though reasonably high under the circumstances and conditions under which they are accepted,

might reasonably be materially higher, were it not for the competition, does justify a lesser charge for the longer haul to a competitive point, like Atlanta, than for the shorter haul to an intermediate local point, like La Grange.

XCIX.

The Fact that the Greater Portion of the Freight Traffic Carried by Appellees is Competitive is No Evidence that the Rates on the Local Traffic are Too High.

Counsel for appellant, in the Circuit Court, insisted that three-fourths of appellees' traffic is competitive; that appellees' competitive rates have paid a reasonable profit; and therefore that the local rates must be unreasonably high.

There are the following competitive points on the line of the Western Railway of Alabama, and the Atlanta & West Point Railroad, viz.: Atlanta, Opelika, Montgomery and Selma.

Trans., pp. 352, 353.

The competitive traffic of the line composed of the Western Railway of Alabama, and the Atlanta & West Point Railroad, therefore consists of the following, viz.:

1. Traffic from Atlanta, and points east thereof, to Selma, and points beyond.

2. Traffic from Atlanta, and points east thereof, to Montgomery, and to points north thereof, and to points south thereof, other than New Orleans.

3. Traffic from Atlanta, and points east thereof, to Opelika, and to points north, and south thereof.

4. Traffic from Selma, and points beyond, to Montgomery, and points north, and south thereof.

5. Traffic from Selma, and points beyond, to Opelika, and points north, and south thereof.

6. Traffic from Selma, and points beyond, to Atlanta, and points beyond.

7. Traffic from Montgomery and points north, and south thereof, to Selma, and to points beyond.

8. Traffic from Montgomery and points north, and south thereof, to Opelika, and to points north and south thereof.

9. Traffic from Montgomery, and from points north, and from points south thereof (other than New Orleans), to Atlanta, and points beyond.

10. Traffic from Opelika and from points north, and south thereof, to Selma, and points beyond.

11. Traffic from Opelika, and points north, and south thereof, to Montgomery, and points beyond.

12. Traffic from Opelika, and points north, and south thereof, to Atlanta, and points beyond.

13. Traffic from New Orleans, via Montgomery, to Atlanta.

There is no evidence whatever in the record as to whether the the rates upon any of the foregoing descriptions of traffic, except

the one numbered 13, have, or have not paid a reasonable profit; and as to the traffic numbered 13, *i. e.*, traffic from New Orleans, via Montgomery, to Atlanta, while there is testimony that in most cases, the revenue derived from it "is sufficient to cover the cost of transportation and terminal charges," there is no testimony that it is sufficient to pay anything toward fixed charges or dividends.

Trans., p. 367.

There is evidence that the thirteen descriptions of competitive traffic mentioned above, taken in connection with the local traffic, pay a dividend of about 6 per cent on the stock of the Atlanta & West Point Railroad, and a dividend of about 3 per cent on the stock of the Western Railway of Alabama; but how much the local rates contribute to said dividends, or how much the descriptions of traffic numbered from 1 to 12 contribute to said dividends, there is no evidence in the record to show.

The descriptions of traffic, numbered from 1 to 12, may not be so severely competitive as the description of traffic numbered 13: *i. e.*, the traffic from New Orleans, via Montgomery, to Atlanta.

The descriptions of traffic numbered from 1 to 12 inclusive may pay not only the cost of movement and terminal expenses, but they may also contribute materially toward the payment of fixed charges and dividends.

It is obvious that whatever proportion the competitive traffic may bear to the total traffic of a railroad, that railroad can only obtain such rates upon the competitive traffic as its competitors may see proper to offer; and whether the competitive traffic contributes much or little toward fixed charges and dividends, such an amount as it may contribute goes that far in relief of the local traffic.

C.

THERE IS NO SUCH COMPETITION AT LA GRANGE AS AT ATLANTA.

The Commission, in its Report and Opinion, says:

"Another fact requiring consideration is, that La Grange is itself a competitive point, *whenever the railroad carriers to that city see fit to actively engage in competition.* The Macon & Birmingham Railroad connects La Grange with Macon over a distance of 105 miles, and that road, in connection with the Southern Railway, *can* carry traffic over about the same distance between Atlanta and La Grange."

"The carriers to La Grange can at will show and claim the existence of strong market and carriers' competition at La Grange, as forcing rates thereto down to the Atlanta basis, or they can, as they do, subject that city to through rates which are merely combination of the rates based on Atlanta or Macon."

Trans., p. 29.

The Macon & Birmingham Railroad is a short line only 97 miles long. It runs from La Grange to Sofkee, where it connects with the Georgia Southern & Florida Railroad, over which it has a trackage arrangement for eight miles between Sofkee and Macon.

Trans., p. 357.

During the year ending June 30, 1898, the Macon & Birmingham Railroad had only four locomotives and 140 freight cars. Its total earnings were $65,129.66; while its operating expenses were $77,511.87. There was a deficit of $12,382.21 in its oper-

tions for that year, and a total deficit at the end of that year of $42,121.80.

Trans., pp. 269, 270.

The Macon & Birmingham Railroad has no line of its own to New Orleans. It has no part of any railway system that reaches New Orleans. It could not form a line from La Grange to New Orleans without using a portion of the appellees' line, or a portion of the Central of Georgia Railway, or a portion of the Southern Railway.

The appellees could not afford to join with the Macon & Birmingham Railroad in making through rates from New Orleans to La Grange, which would be as low as the rates which appellees charge from New Orleans to Atlanta; because were they to do so, appellees would be charging less to La Grange than they charge to other local stations on their line between La Grange and New Orleans.

The Southern Railway could not afford to join with the Macon & Birmingham Railroad in making through rates from New Orleans to La Grange which would be as low as the rates which appellees charge from New Orleans to Atlanta; because were it to do so, the Southern Railway would be charging less to La Grange than it charges to certain local stations on its own line between Birmingham and Woodbury.

The Central of Georgia Railway could not afford to join with the Macon & Birmingham Railroad in making through rates from New Orleans to La Grange, which would be as low as the rates which appellees charge from New Orleans to Atlanta; because were it to do so, the Central of Georgia Railway would be charging less to La Grange than it charges to certain local stations on its own line between Birmingham and Macon.

Trans., pp. 358, 359.

CI.

There is No Concert Between Carriers to Stifle Competition at La Grange.

The Commission, in its Report and Opinion, seeks to create the impression that there is a combination or agreement between the Atlanta & West Point Railroad, and the Macon & Birmingham Railroad, not to compete at La Grange on the same rates as obtain at Atlanta. There is not a scintilla of testimony that any such combination or agreement now exists, or ever has existed. I have shown in the last preceding section why it is that neither the Southern Railway, nor the Central of Georgia Railway, can afford to join with the Macon & Birmingham Railroad in making through rates from New Orleans to La Grange, which would be as low as the rates which the appellees charge from New Orleans to Atlanta. Neither the Southern Railway, nor the Central of Georgia Railway, could afford to pick out La Grange, which is a purely local noncompetitive station on the Atlanta & West Point Railroad, and give to it, in the absence of controlling competition at that point, rates from New Orleans, which would be lower than the rates which the Southern Railway, and the Central of Georgia Railway, are charging to local stations on their respective lines, which local stations are nearer than La Grange is to New Orleans. And unless the Macon & Birmingham Railroad can induce either the Southern Railway, or the Central of Georgia Railway, to join in making through rates from New Orleans to La Grange which would be as low as the rates which the appellees charge from New Orleans to Atlanta, it is impossible for the Macon & Birmingham Railroad to create as severe competition at La Grange, as exists at Atlanta.

CII.

There is a Natural Reason Why the Force of Competition at La Grange Should Not be as Great as at Atlanta.

The traffic at La Grange is not sufficient to induce competition of such force as exists at Atlanta.

The population of La Grange is between 4,000 and 5,000; while that of Atlanta is estimated to be 100,000.

Trans., pp. 31, 32.

For the year ending June 30, 1895, the freight carried by appellees from New Orleans to Atlanta amounted to 6,773 tons; while the freight carried by appellees from New Orleans to La Grange amounted to only 100 tons. In other words, the New Orleans-Atlanta traffic was more than sixty times as great as the New Orleans-La Grange traffic.

Trans., p. 40.

This Court has said that the English cases establish the rule that in passing upon the question of undue or unreasonable preference or disadvantage, it is not only legitimate, but proper to take into consideration various elements, and among others "*the relative quantities or volume of the traffic involved.*"

162 U. S., p. 232 T. & P. Ry. v. I. C. C.

In the case of I. C. C. v. Alabama Midland Railway this Court said:

"It seems undeniable, as the effect of the evidence on both

sides, that an actual dissimilarity of circumstances and conditions exists between the cities concerned, both as respects *the volume of their respective trade* and the competition, affecting rates, occasioned by rival routes," etc.

168 U. S., 175, I. C. C. v. Alabama Midland Railway.

If the Macon & Birmingham Railroad could succeed in inducing the Southern Railway, or the Central of Georgia Railway, to join in making through rates from New Orleans to La Grange, the same as the rates to Atlanta, the appellees would have the legal right to meet such competition at La Grange, without being required to reduce their rates to other local stations situated between La Grange and New Orleans; but there is nothing in the Act to Regulate Commerce which would *compel* the appellees to meet the supposed competition at La Grange. They could do so or not, as their interests might dictate; and in deciding upon their course of action, they would be largely governed by the amount of traffic at La Grange. If the volume of traffic at La Grange equalled that at Atlanta, the appellees would probably elect to meet the competition. But if the volume of traffic at La Grange were insignificant, the appellees might elect to abandon the whole of it to the Macon & Birmingham Railroad and its connections, rather than compete for it at the Atlanta rates.

CIII.

Though the Same Markets and Same Lines of Transportation Compete for La Grange Business as for Atlanta Business, They Do Not Compete at the Same Rates to La Grange as to Atlanta.

It may be that New Orleans, Louisville, Cincinnati, New York, and other markets compete with each other in the sale of goods at La Grange, as well as at Atlanta, but in their competi-

tion, they recognize and act upon the fact that the rates to La Grange are higher than those to Atlanta; and so far as this record shows, none of those competing cities has ever demanded, or even requested that the rates to La Grange shall be made as low as to Atlanta.

It may be that the same lines of transportation that can be formed and compete for business from the East and West to Atlanta, can be formed and compete for business to La Grange; but in their competition, they recognize and act upon the fact that the rates to La Grange are higher than the rates to Atlanta; and so far as this record shows, none of those lines of transportation has ever demanded, or even requested that the rates to La Grange be made the same as the rates to Atlanta. The appellees having a through line from New Orleans to La Grange could doubtless arbitrarily put into effect the same rates to La Grange as to Atlanta; but as no rival line has ever offered to compete at the same rates to La Grange as to Atlanta, if the appellees were to arbitrarily accept the same rates to La Grange, as to Atlanta, they would have to accept the same rates to other local stations which are situated between La Grange and New Orleans; or they would be guilty of wilful and unjust discrimination against those stations.

Though the Macon & Birmingham Railroad is a short, weak and unimportant line, it may be within the range of possibility for it to induce its connections to agree upon through rates from New Orleans to La Grange, the same as those to Atlanta; and whenever it and its connections offer to compete at La Grange, *at the same rates as obtain at Atlanta*, the appellees will be justified in meeting such competition, and in reducing their La Grange rates to the same as their Atlanta rates. If the appellees were forced to reduce the La Grange rates under competition, inaugurated by the Macon & Birmingham Railroad and its connections, they would not be compelled to make similar reductions to their

other local stations situated between La Grange and New Orleans; because, in the case supposed, the competition at La Grange would be as effective in the reduction of rates to La Grange, as the competition at Atlanta has been effective in the reduction of rates to Atlanta. But until the Macon & Birmingham Railroad and its connections shall put in the same rates from New Orleans to La Grange as obtain at Atlanta, the appellees have no right to voluntarily discriminate in favor of La Grange as against other local stations which are situated between La Grange and New Orleans.

CIV.

The Alleged Undue Preference in Favor of Opelika.

Counsel for appellant, in the Circuit Court, contended that appellees' rates from New Orleans to Opelika are such that freight can be shipped from New Orleans to Opelika, and pay the local rates from Opelika to La Grange, at a less total cost to the Opelika merchant, than the rates which appellees charge from New Orleans to La Grange. Even if the facts were as contended for by counsel, it is evident that the La Grange merchants can use the Opelika rates as basing rates, and thereby secure as low rates from New Orleans to La Grange, as can be secured by Opelika merchants As a matter of fact, merchants doing business at La Grange may choose between the competitive rates which obtain at Montgomery, and those which obtain at Opelika, and those which obtain at Atlanta; and they naturally select those which make the lowest total combination from New Orleans to La Grange.

CV.

The Complaint that Atlanta Merchants Can Compete with La Grange Merchants, in La Grange.

It is true that the rates from New Orleans to Atlanta, added to the Georgia Railroad Commission rates from Atlanta to La Grange, exactly equal the rates from New Orleans to La Grange; and therefore, if an Atlanta merchant should purchase freight at New Orleans, and have it carried to Atlanta, and thence back to La Grange, the railroad rates paid by him would be exactly the same as those paid by a merchant at La Grange, shipping directly from New Orleans to La Grange.

But the Atlanta merchant would, in addition to the railroad rates, paid by him, pay drayage from the depot in Atlanta to his store, and drayage from his store back to the depot.

The La Grange merchant would pay drayage from the depot in La Grange to his store; but he would not be compelled to pay drayage *from* his store; and to *that* extent at least he would have the advantage of the Atlanta merchant; to say nothing of the advantage which the La Grange merchant would have by reason of his personal acquaintance, and business influence in his own town. Suppose, however, it be said that the Atlanta merchant has the advantage of larger capital, so that he can at least sell on terms of equality in La Grange. While that fact may operate to restrict the sales of La Grange merchants, it gives to the consumers at La Grange a choice between Atlanta merchants and their own.

The consumers are as much a part of the public, as the merchants at La Grange.

CVI.

The Complaint that Atlanta Merchants Have an Advantage Over La Grange Merchants in Competition at Points Between Atlanta and La Grange.

It is true that the rates from New Orleans to Atlanta added to the Georgia Railroad Commission rates from Atlanta to Fairburn, Palmetto, Newnan and Hogansville, are less than the rates from New Orleans to La Grange, added to the Georgia Railroad Commission rates from La Grange to the same points. This results, as heretofore explained, from the fact that the rates from New Orleans to Atlanta are made exceptionally low by the severe competition which exists there; and that the rates from either Atlanta, or La Grange, to the points mentioned, are made by the Georgia Railroad Commission, and made to increase with the distance.

If, however, La Grange be entitled to a decree in this case that her rates from New Orleans shall be no higher than the rates from New Orleans to Atlanta, it is certain that Hogansville, Newnan, Palmetto and Fairburn (which are also shorter distance points than Atlanta), will demand a similar decree. The consequence will be that the rates from New Orleans to La Grange, Hogansville, Newnan, Palmetto and Fairburn will be the same; and while none of them will be higher than the rates from New Orleans to Atlanta, it will be impossible for La Grange to sell at any point between La Grange and Atlanta if the matter of railroad rates is one of controlling force. Take for instance, Hogansville, which is situated thirteen miles east of La Grange. A La Grange merchant would have to pay the same rates from New Orleans as a merchant at Hogansville would pay; and in addition thereto, the La Grange merchant

would be compelled to pay the Georgia Railroad Commission rates from La Grange to Hogansville. If, therefore, the power to compete depends entirely upon the matter of railroad rates, the La Grange merchant could not compete at any point either east or west of La Grange; and, therefore, so far as railroad rates are concerned, the La Grange merchant would not be one iota better off than he now is

CVII.

Railroad Rates Do Not Control the Destinies of Cities.

Appellant's witnesses testify with substantial unanimity that "relatively low or preferential rates to a locality, increase the population, induce the investment of capital there, and promote prosperity in every respect;" while "relatively high rates, which discriminate against a locality, decrease the population, retard the investment of capital, and reduce prosperity in every respect."

Trans., p. 287.

The present relation, which exists between the rates from New Orleans to La Grange, and the rates from New Orleans to Opelika, Hogansville, Newnan, Palmetto, Fairburn and Atlanta, respectively, has been in existence, certainly, since 1888; and it was doubtless in existence long prior thereto. It has been in existence sufficiently long, at least, to test the soundness of the theory which appellant's witnesses advance with so much confidence and unanimity.

Complainant Calloway testifies that in 1890 the population of La Grange was 3,100; while at the time he gave his testimony in this case, it was between 4,000 and 5,000. It would seem, there-

fore, that the rates of which La Grange complains have not had the effect "to decrease the population" of that place.

Trans., p. 83.

Mr. Calloway also states that La Grange has 35 or 40 good mercantile establishments; two large cotton mills; foundry; carriage factory; creamery; grist mills and planing mills; waterworks and electric light plant; two railroads; two large female colleges; and several other smaller industries.

Trans., p. 285.

It would seem, therefore, that the rates of which La Grange complains have not had the effect "to retard the investment of capital," "or to reduce the prosperity" of that place.

La Grange is situated 38 miles east of Opelika; 13 miles west of Hogansville; and 46 miles west of Palmetto. Opelika, Hogansville and Palmetto each have materially lower rates than La Grange has.

Trans., pp. 6, 34, 35.

Now if relatively low or preferential rates have the effect to "increase population," "induce the investment of capital," and "promote prosperity in every respect," we would naturally suppose that Opelika, Hogansville, and Palmetto, with their "low or preferential rates," would have far outstripped La Grange, in the race for commercial supremacy. The fact, however, is as testified to by Mr. Calloway himself, and by all of appellant's other witnesses, that Opelika's population is no more than that of La Grange, and the business industries at Opelika are substantially the same in character, and in number, as those at La Grange. Hogansville, with all her advantage over La Grange in the matter of rates, has a population of only 750; and Palmetto, with all her advantage in rates over La Grange, has no larger population than Hogansville.

Trans., pp. 285, 286.

There must be something, therefore, other than a difference in railroad rates, to account for the relative population, business industries, etc., of La Grange, Opelika, Hogansville, and Palmetto. "Exceptional sagacity and enterprise," leading to "large investments in business industries," will be found in a vast majority of cases to have far more influence than railroad rates upon the destinies of towns and cities.

CVIII.

The Commission Has No Power to Make Specific Rates.

The Commission, in one of its earliest cases, decided that it had no power to make or fix rates generally, and that its power in respect to rates was confined to determining "whether those which the roads impose are, for any reason, in conflict with the statutes."

1 I. C. C. Rep. pp. 155, 156, Thatcher v. D. & H. C. Co. et al.

In the case of C. N. O. & T. P. Ry. v. I. C. C., 162 U. S., p 197, this Court held that the Commission had no power to make or fix a specific maximum rate for the transportation of first-class freight, in less than car loads, from Cincinnati to Atlanta.

The Commission, however, declined to accept the decision of this Court in that case as a finality of the question as to the power of the Commission to make specific rates; and the case of I. C. C. v. C. N. O. & T. P. Ry., 167 U. S., 479, was brought to this Court upon a certificate of division, for the express purpose of excluding every other question from the record; and thus obtaining the opinion of this Court upon the single question as to the power of the Commission to make specific rates. This Court again decided that the Commission has no such power.

The same question was again raised and expressly decided by this Court in the same way, in 168 U. S., pp. 161, 162, I. C. C. v. Alabama Midland Railway.

In the case at bar, the Commission totally disregarded both of said decisions of this Court, and in one part of its order "recommended" that the appellees so revise their schedules that the rates charged by them from New Orleans to La Grange shall not exceed the following specific rates, viz.:

Class	1	2	3	4	5	6	A	B	C	D	E	H	F
Rates	103	88	77	64	52	42	24	31	24	20	44	49	40

Trans., pp. 50, 51.

If said "*recommendation*" is to be treated as an "*order*," it is manifestly unlawful and void, as expressly decided by this Court, in both of the two last mentioned cases cited above; for such an order is a direct attempt to make specific maximum rates, from New Orleans to La Grange.

CIX.

The Commission Has no Power to Make Relative Rates.

I have shown, in the last preceding section, that it has been twice decided by this Court that the Commission has no power to make specific rates in a direct form; as, for instance, to order the appellees not to charge more than certain specific rates from New Orleans to La Grange.

The Commission, in the case at bar, has however undertaken to fix rates from New Orleans to La Grange in an indirect form.

In one part of its order, it orders the appellees to desist from charging higher rates from New Orleans to La Grange than they contemporaneously charge from New Orleans, Hogansville, Newnan, Palmetto, or Fairburn.

Trans., p. 50.

A similar attempt was made by the Commission in the case of Southern Pacific Co. v. Colorado Fuel & Iron Co., 101 Fed. Rep., pp. 784, 785, to make relative rates; and the U. S. Circuit Court of Appeals for the Eighth Circuit said:

"Prescribing a rate from Pueblo, Col., to San Francisco, Cal., by reference to a rate that had theretofore been established by carriers between Chicago and San Francisco, involved the exercise of legislative functions *to the same extent as fixing the rate between the former points on an independent consideration* of what would be a reasonable compensation for the service." . . . . "We feel constrained to hold that the Commission exceeded its authority in this part of the order, and that it had no more power to fix a rate from Pueblo to San Francisco by relation to the theretofore existing rate from Chicago to San Francisco *than it had to fix the former rate upon an independent consideration* of what would be a reasonable charge."

CX.

The "Findings of Fact" Made by the Commission in the Case at Bar are not Entitled to be Treated as Prima Facia Evidence.

"Findings of fact" are not even *prima facie* evidence, unless the inquiry made by the Commission be conducted "on a proper basis."

162 U. S., p. 235, T. & P. Ry. v. I. C. C.

"Findings of fact" must be made "upon a full consideration of all the circumstances and conditions upon which a legitimate order could be founded."

162 U. S., p. 238, T. & P. Ry. v. I. C. C.
175 U. S., p. 676, L. & N. R. R. v. Behlmer.

"Findings of fact" must be made "in the light of all facts duly alleged and supported by competent evidence."

162 U. S., p. 238, T. & P. Ry. v. I. C. C.
175 U. S., p. 676, L. & N. R. R. v. Behlmer.

If the Commission exclude facts and circumstances that ought to have been considered, or if it "unduly restricts its inquiries," the "findings of fact" are not *prima facie* evidence.

162 U. S., pp. 235, 239, T. & P. Ry. v. I. C. C.

The inquiry made by the Commission in the case at bar was not conducted "on a proper basis;" it was not made "upon a full consideration of all the circumstances and conditions upon which a legitimate order could be founded;" and it was "unduly restricted," in its scope.

The Commission in its finding in regard to the reasonableness of the LaGrange rates based its finding upon the fact that the rates to the longer distance points are lower; and did not give "full consideration" to the fact that the only reason why the rates to the longer distance points are lower is that active and effective competition at Atlanta prevents the appellees from making them higher.

Again: If the "findings of facts" be self-contradictory, they are not *prima facie* evidence. "In other words, two absolutely conflicting propositions cannot at the same time be adopted."

186 U. S., p. 339, I. C. C. v. C., etc., Rd. Co.

In the case at bar, the proposition that the LaGrange rates are unreasonable in and of themselves is absolutely conflicting with the proposition that the appellees may continue to charge rates to LaGrange as high as the rates to the longer distance points.

181 U. S., pp. 23, 26, E. T. V. & G. Ry. v. I. C. C.

The Circuit Court erred therefore, in treating the "findings of fact" in the case at bar, as *prima facie* evidence.

Trans., p. 399.

CXI.

Even if the "Findings of Fact" can be Treated as Prima Facie Evidence, they are not Conclusive.

The fact that the Court is authorized to "hear and determine the matter as a court of equity" necessarily implies that the Court is not concluded by the findings or conclusions of the Commission.

162 U. S., p. 239, T. & P. Ry. v. I. C. C.
168 U. S., p. 175, I. C. C. v. Ala. Midland Ry.
50 Fed. Rep., 304, I. C. C. v. A. T. S. F. R. Co.
49 Fed. Rep., 180, I. C. C. v. L. V. R. Co.
37 Fed. Rep. pp. 613, 614, K. & I. Bridge Co. v. L. & N. R. R.

There is power in the Circuit Court, and the Circuit Court of Appeals "to consider and apply the evidence," and in this Court to review their decisions.

168 U. S., p. 174, I. C. C. v. Ala. Midland Ry.

It may be shown that the evidence offered in the Circuit

Court " was sufficient to overcome any *prima facie* case that may have been made by the findings of the Commission."

162 U. S., p. 195, 196, C. N. O. & T. P. Ry. v. I. C. C.

On the hearing before the Commission the complainant Calloway was the only witness introduced in his behalf.

He did not testify that the La Grange rates are unreasonable in and of themselves; nor did he testify to any fact bearing upon their reasonableness except that they are higher than the rates to the longer distance points.

The only witnesses who testified before the Commission in regard to the reasonableness of the La Grange rates were Mr. Lutz and Mr. Knott; both of whom testified that said rates are just and reasonable in and of themselves.

Trans., p. 104, 117.

In addition to the testimony of Messrs. Lutz and Knott, the appellees were, as held by the Commission itself in other cases, entitled to the benefit of the legal presumption that said rates are reasonable in and of themselves.

1 I. C. Rep., 375, Harding v. C. St. P. M. & O. R. Co.
7 I. C. Rep., 234, Brewer & Hanleiter v. L. & N. R. R.

With the exception of the fact that the La Grange rates are higher than the rates to the longer distance points, there was absolutely no evidence before the Commission to overcome the legal presumption that the La Grange rates are just and reasonable in and of themselves.

After the case got to the Circuit Court a large amount of additional testimony was taken by the appellees. Numerous traffic

experts testified that in their opinion the La Grange rates are just and reasonable in and of themselves, and they stated the reasons for the opinions expressed by them. Many additional facts were also proven in the Circuit Court which showed that the La Grange rates are reasonable. The testimony taken by appellees in the Circuit Court as to the reasonableness of the La Grange rates is hereinbefore referred to in Sections XXI to XXXII, both inclusive, and they will not be repeated here.

The Circuit Court erred in holding that the testimony submitted by the appellees was not sufficient to overcome the "findings of fact" made by the Commission; and the Circuit Court of Appeals was right in reversing the decree of the Circuit Court, and in declining to enforce the order of the Commission.

CXII.

The Finding Made by the Commission on a Mixed Question of Law and Fact is not Entitled to as Much Weight as the General Verdict of a Jury, or the General Finding of a Court.

It has been said by this Court that the question whether a rate is reasonable, is a question of "fact."

162 U. S., 196, C. N. O. & T. P. Ry. v. I. C. C.
162 U. S., 219, 227, 235, 238, T. & P. Ry. v. I. C. C.
175 U. S., 676, L. & N. R. R. v. Behlmer.
181 U. S., 28, E. T. V. & G. Ry. v. I. C. C.

It is manifest, however, that the Court did not intend to say that the question whether a rate is reasonable is one of "pure fact;" but that it is a question of fact mixed with law.

Some questions involve "pure matters of fact, unmixed with any element of law;" while other questions involve matters of fact in which are mixed certain elements of law; and the latter are known as "questions of mixed law and fact."

Bliss' Code Pldg, 208.

Thus, the question of fraud is one necessarily compounded of fact and of law.

123 U. S, 432, 433, Jewell v. Knight.

And so the questions of "negligence," and "reasonableness," are mixed questions of law and fact.

88 Fed. Rep., p. 448, Dooley v. Pease.

It has been said by this Court that "the general verdict of a jury *concludes* mixed questions of law and fact, except so far as they may be saved by some exception which the party has taken to the ruling of the courts upon a question of law."

112 U. S., p. 674, Martinton v. Fairbanks.

9 Wall., p. 127, Norris v. Jackson.

But a finding of facts made by the Commission does not "conclude" either pure questions of fact, or mixed questions of law and fact; because the Act to Regulate Commerce expressly enacts that a finding of facts made by the Commission shall be only *prima facie* evidence.

37 Fed. Rep., 613, K. & I. Bridge Co. v. L. & N. R. R.

62 Fed. Rep., 693, Shinkle, Wilson & Kreis Co. v. L. & N. R. R.

Prima facie evidence as defined by this Court is such as, in judgment of law, is sufficient to establish a fact, unless said evidence be rebutted.

6 Pet. (632), Kelly v. Jackson.

14 Pet. (347), U. S. v. Wiggins.

97 U. S., 268, Lilienthal's Tobacco v. U. S.

In a word, while the general verdict of a jury "*concludes*" a mixed question of law and fact, a finding made by the Commission is only *prima facie* evidence of the fact, and may be rebutted; either by the evidence taken before the Commission, or by the evidence afterward taken in the Circuit Court.

There is a substantial reason why Congress did not permit a finding by the Commission to have the conclusive effect of a general verdict by a jury on a mixed question of law and fact.

Every mixed question of law and fact necessarily involves matter of law; and every litigant has the right to have all matters of law decided *by the Court.*

The Interstate Commerce Commission "is invested with only administrative powers of supervision and investigation which fall far short of making the board a court, or its action judicial, in the proper sense of the term."

37 Fed. Rep., 613, K. & I. Bridge Co. v. L. & N. R. R.

While the Act to Regulate Commerce gives to findings of fact made by the Commission the effect of *prima facie* evidence, it does not give to the "conclusions" of law reported by the Commission any effect whatever.

The Commission itself concedes that its "conclusions" have no binding force.

3 I. C. Rep., p. 153, left col., Rates and Charges on Food Products.

If the Commission is not a court, and its finding on a mixed question of law and fact should be held to be as conclusive as the general verdict of a jury, it would be impossible for a party to obtain the judgment of any court upon such matter of law as might be involved in the question.

But in the case of a general verdict by a jury either party may readily obtain the judgment of the Court on any matter of law that may be involved in a mixed question of law and fact.

This may be done in one of four modes:

First: Either party may request the Court to give the jury proper instructions as to the rules and principles of law by which they are to be governed in their determination of the question.

Second: Or either party may request the Court to inform the jury hypothetically, whether or not the facts which the evidence tends to prove will, if established in the opinion of the jury, satisfy the allegation in the pleading.

Third: Or either party may request the Court to instruct the jury to find the facts specially; and then the Court will apply the law, and pronounce whether or not the facts so found are sufficient to support the averments of the parties.

Fourth: Or either party may present to the Court their propositions of law, and require the Court to rule on them.

1 Head (Tenn.) 616, 617, Whirley v. Whiteman.
9 Wall, 128, 129, Norris v. Jackson.
52 Mo., 207, 209, Fourth National Bank v. Heuschen.
19 Am. and Eng. Enc. of Law, p. 633.

But, as the proceedings before the Interstate Commission are had in advance of the proceedings in court, it is impossible for a party to ever obtain the judgment of any court upon the matter of law involved in a mixed question of law and fact, if the finding made by the Commission on that question be given as conclusive effect as is given to the general verdict of a jury.

Under the fourth section of the act of March 3, 1865, when the parties waive a jury, a general finding of the Court upon the facts has the same effect as the general verdict of a jury; and where the general finding of a Court includes a mixed question of law and fact it is as conclusive as the general verdict of a jury, except so far as the matter of law involved in the question may be saved by some exception which the party has taken to the ruling of the Court on the law.

9 Wall, 127, 128, Norris v. Jackson.

12 Wall, 297, Miller v. Life Ins. Co.

But, even where the finding of a trial court is general, either party may readily obtain the judgment the Appellate Court on any matter of law that may be involved in a mixed question of law and fact.

This may be done in one of four ways:

First: Either party may object to the admission or exclusion of evidence and require the trial Court to rule on the objection.

Second: Or either party may present to the trial Court his propositions of law and require the Court to rule on them.

Third: Or either party may ask for definite ruling by the Court as to whether all the evidence is sufficient in law to warrant a finding in his favor.

Fourth: Or either party may get the trial Court to make a special finding, which raises the legal propositions.

9 Wall, 128, 129, Norris v. Jackson.

12 Wall, 297, Miller v. Life Ins. Co.

112 U. S., 672, 673, Martinton v. Fairbanks.

When the verdict of a jury is special, or the finding of facts by a court is special, such a verdict or finding "raises the legal propositions" involved in a mixed question of law and fact, and the power of review by this Court extends "to the determination of the sufficiency of the facts found to support the judgment."

9 Wall, 128, 129, Norris v. Jackson.
12 Wall, 297, Miller v. Life Ins. Co.
112 U. S., 672, 673, Martinton v. Fairbanks.

It will be seen therefore that whether the verdict of a jury or the finding of a Court be general or special, either party can compel the separation of matter of law from matter of fact involved in a mixed question of law and fact, and demand the judgment of the Court upon so much of the question as consists of matter of law. But according to the contention of appellant the finding of the Commission on the mixed question of law and fact as to the reasonableness of a rate is conclusive on the matter of law involved in the question, and neither this nor any other Court can review the judgment of the Commission on such matter of law.

To paraphrase the language of this Court in C. M. etc., Ry. v. Tompkins, 176 U. S., p. 172, when we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protecting principle which insures to every one else the judgment of the *courts* upon all questions of *law*, is one which cannot be tolerated.

Respectfully submitted,

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